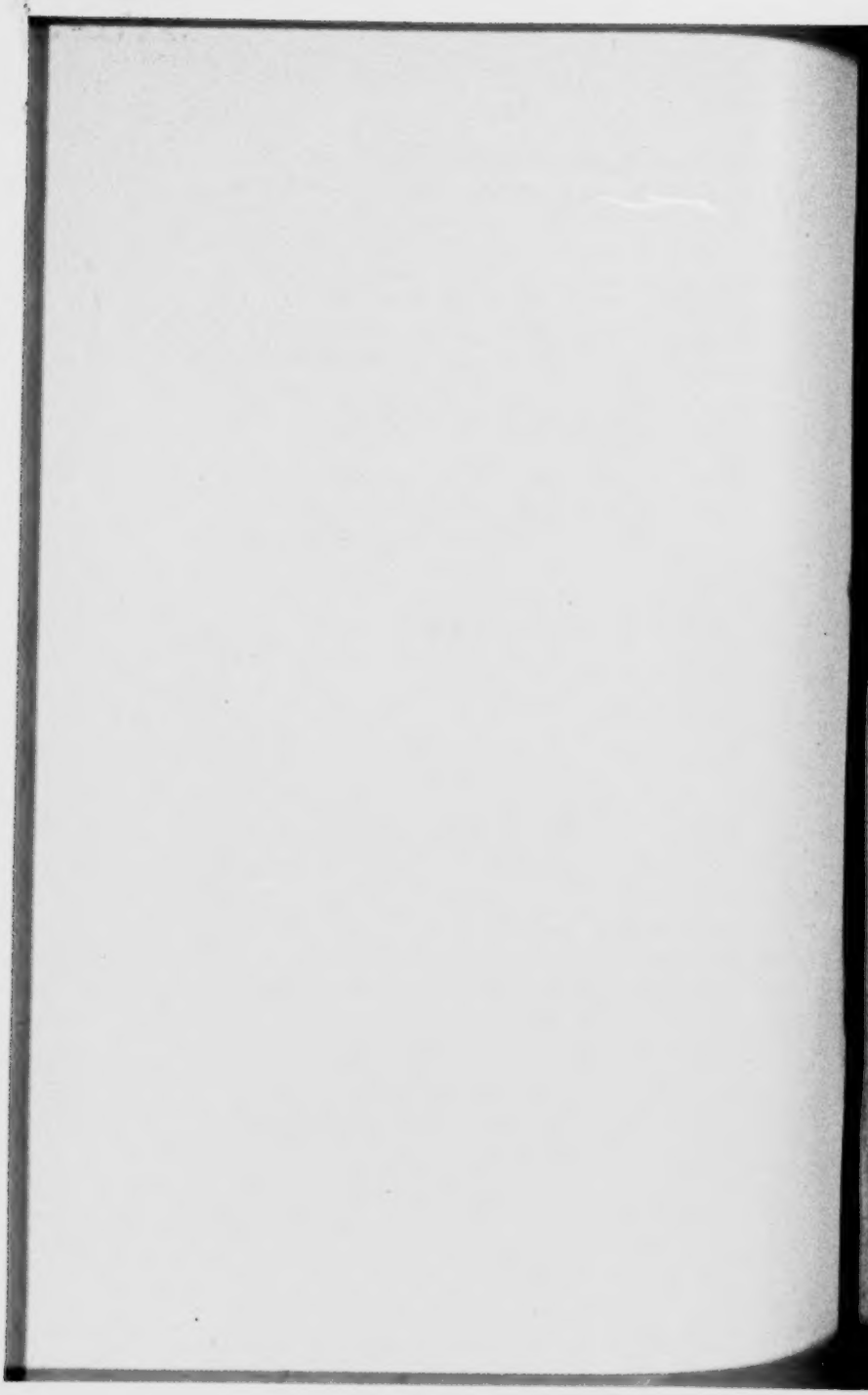

No. 365.
Br. of Hill, Kellogg, Rose & Pette
for Appellants.

Office Supreme Court U. S.
FILED
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JAMES H. KENNEDY, Clerk

Filed Nov. 13, 1901.

In the Supreme Court of the United States.

OCTOBER TERM, A. D. 1901.

BENJAMIN D. GREENE, JOHN F. GAYNOR, William T. Gaynor, and Edward H. Gaynor, appellants,

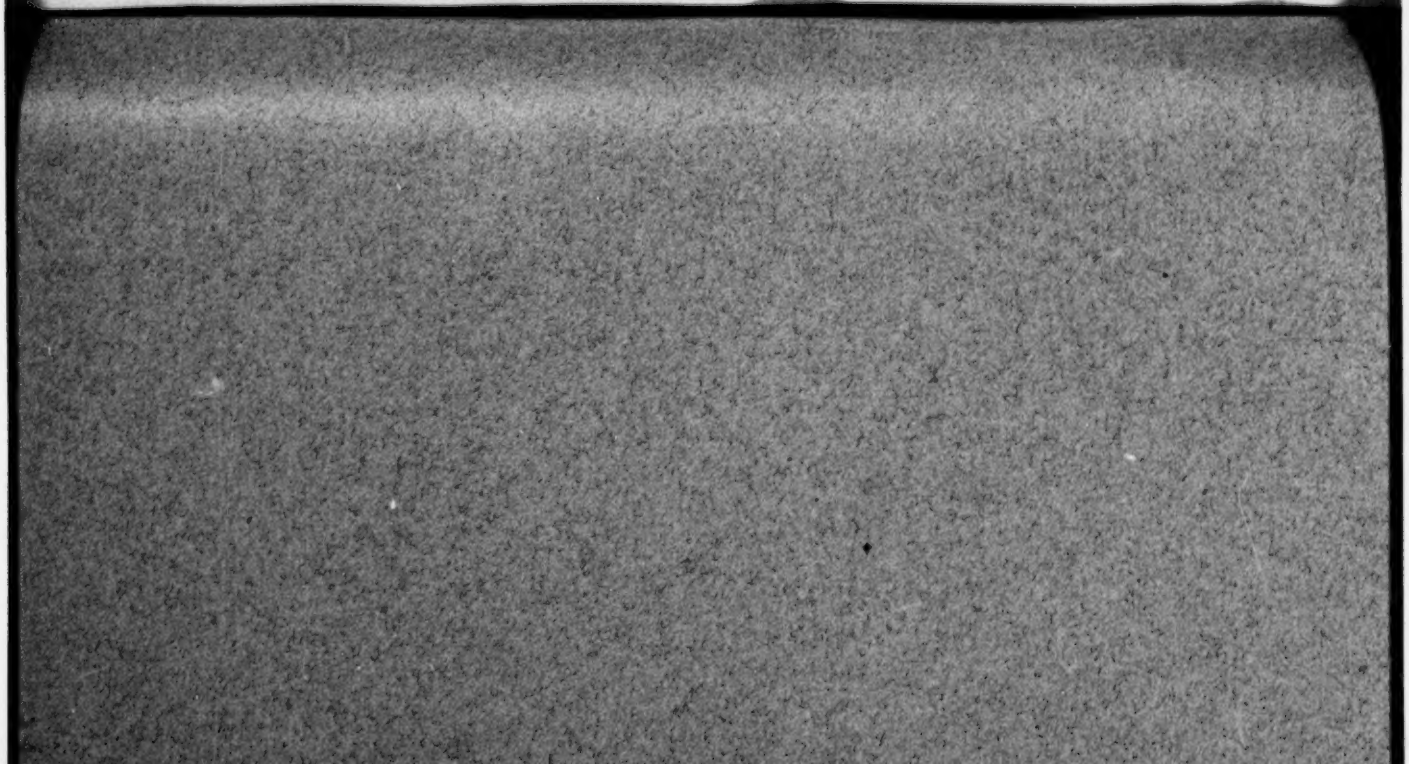
against

WILLIAM HENKEL, UNITED STATES MARSHAL in and for the Southern District of New York, appellee.

No. 365.

BRIEF FOR APPELLANTS.

DAVID B. HILL,
L. LAFLIN KELLOGG,
ABRAM J. ROSE,
ALFRED C. PETTÉ
Of Counsel.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

BENJAMIN D. GREENE, JOHN F. Gaynor, William T. Gaynor and Edward H. Gaynor, *Appellants,* *against* WILLIAM HENKEL, United States Marshal in and for the Southern District of New York, *Respondent.*	No. 365.

BRIEF FOR APPELLANTS.

Appeal from a final order of the Circuit Court the United States for the Southern District of New York Denying the Appellants' Application for a Writ of Habeas Corpus.

Statement.

This is an appeal from an order made by Circuit Judge E. Henry Lacombe, denying the appellants' application for a writ of habeas corpus.

The petition for the writ presented to the Circuit Court shows that the petitioners were, at all the

times mentioned therein, citizens of the United States; Benjamin D. Greene being a resident of the State of Connecticut, John F. Gaynor and William T. Gaynor being residents of the State of New York, and Edward H. Gaynor being a resident of the State of Massachusetts, and that none of them was in any way connected with the land or naval forces of the said United States.

That they are imprisoned and restrained of their liberty in the custody of William Henkel, United States Marshal for the Southern District of New York, by virtue of a warrant of removal under Section 1014 of the Revised Statutes of the United States, signed by the Honorable Addison Brown, Judge of the District Court of the United States for the Southern District of New York, and not by virtue of any judgment, decree or final order thereof.

That the cause of said imprisonment is that warrants for their arrest were issued by John A. Shields, United States Commissioner, and that certain proceedings were thereafter had before such Commissioner, who committed them to await a warrant for their removal to the Eastern Division of the Southern District of Georgia for trial upon an alleged indictment purporting to have been found by the Grand Jury for the Eastern Division of the Southern District of Georgia, and that upon such proceedings, and upon application of the United States Attorney for the Southern District of Georgia, Judge Addison Brown, of the District Court of the United States for the Southern District of New York, granted a warrant of removal.

That the basis of the proceedings before said Commissioner, and upon which the warrants for their arrest were issued, was a complaint made by one Clarence S. Houghton, Assistant United States Attorney for the Southern District of New York, based upon information contained in the said alleged indictment found by the said alleged Grand

Jury, on the 8th day of December, 1899, and which said indictment purported to have been found under, and in pursuance of, Sections 5438 and 5440 of the Revised Statutes of the United States, and charges the appellants with conspiracy to defraud the said United States.

That the petitioners voluntarily appeared before said Commissioner and demanded an examination on the charges made against them.

That upon such examination the appellants moved to dismiss the complaint, because it set forth no crime or offence under the laws of the United States, which motion was denied, and an exception taken.

That thereafter the complaint was amended, whereupon the motion to dismiss was renewed and again denied, and an exception taken.

That the Government thereupon offered in evidence a certified copy of the indictment set out in the amended complaint, and evidence was given on its behalf tending to show the identity of the appellants with the persons charged in the indictment.

That after the offer of such proof, the appellants offered evidence tending to show that there was no probable cause to believe that the offence charged in the complaint had been committed by them, which evidence was all rejected by the Commissioner, and these appellants were held to await a warrant of removal by the United States District Judge.

That thereafter a motion was made before the Hon. Addison Brown, United States District Judge, by the Government for a warrant for their removal to the Southern District of Georgia for trial upon the indictment referred to in the complaint.

That this motion was opposed by the appellants and, after due deliberation, was denied by the District Judge.

That among the reasons stated by him in his opinion refusing removal, were the following:

"The stenographer's notes of the proceed-
" ings returned by the Commissioner con-
" sisted of about 1,100 pages, showing, how-
" ever, no other evidence of the commission
" of the offence than a certified copy of the
" indictment. Some evidence was given as
" to the identity of the defendants as the
" persons charged, and this was not seriously
" contested. Aside from this and the argu-
" ments of counsel, the whole record consists
" of little except rulings upon the evidence
" on behalf of the defendants sought to be
" introduced, and numerous exhibits, all of
" which, so far as pertained to the merits or
" tended to show the innocence of the ac-
" cused and the want of probable cause, were
" rejected, mostly on the ground that the
" question of guilt or innocence should only
" be heard and determined upon the trial
" under the indictment. * * * As respects
" procedure, the present case is identical with
" that of *In re* Dana (68 Fed. Rep., 886), in
" which this Court, upon careful considera-
" tion, pointed out the course necessary to
" be pursued in cases of this character under
" Section 1014 of the United States Revised
" Statutes, and under the law of this State
" thereby virtually adopted. The views
" there expressed seem to have been ap-
" proved by Lacombe, J., in Price's case
" (83 Fed Rep., 830), where the course in-
" dicated in the Dana case was followed
" by the examination of several witnesses
" to show probable cause as well as the
" production of an exemplified copy of
" the indictment. It was also approved in
" the case of *In re* Wood (95 Fed. Rep., 288),

"and, so far as I am aware, it has not been "disapproved in any subsequent reported "case. In view of these decisions, which "were repeatedly called to the Commissioner's attention, I find it difficult to understand the disregard of them in the rejection "of the great mass of competent evidence "and exhibits offered in the defendant's behalf. In that decision it was pointed out "that the proceeding for commitment and "removal under Section 1014 is an original "proceeding to be conducted according to "the laws of the State in similar proceedings "before committing magistrates; that the "object of the proceeding is to enable the "Commissioner to ascertain for himself "whether from the proof of facts and circumstances produced before him there is "probable cause to believe the defendants "guilty of the offence charged. * * * "By a singular inversion, however, the best "reason for the admission of the defendant's "proposed evidence, namely, its tendency to "show innocence of the charge and the lack "of probable cause, was in this instance "made the reason for excluding it. A certified copy of the indictment having been "received by the Commissioner, it was "thereupon contended by the prosecution, "and virtually ruled by the Commissioner, "that the evidence was closed as respects "the question of guilt, and that no evidence "disproving it could be allowed, since that "would be 'trying the issue' here instead "of in Georgia. Thus, although the right to "show want of probable cause was admitted in form, it was in substance denied;

"since whatever would disprove the alleged "offence was for that very reason excluded.',

See Opinion. Brown, J., Record, pp. 45-47.

That upon this decision an order was made by the District Judge directing that the motion, as it then stood, be denied "AND THE MATTER SENT BACK "TO THE COMMISSIONER FOR FURTHER COMPETENT "TESTIMONY OFFERED BY EITHER SIDE IN ACCORD-"ANCE WITH THE OPINION RENDERED HEREIN."

See Order, Record, p. 55, fol. 101.

That pursuant to said order further proceedings were had before Commissioner Shields, and a large number of witnesses were examined on behalf of the Government, and on behalf of these appellants, which evidence was reported to the District Judge for the Southern District of New York, together with a finding by the Commissioner to the effect that the evidence in his judgment established a case of probable cause requiring these appellants to be held to await a warrant for their removal.

See Record, pp. 3-4, fols. 7-8.

That the matter again came before the District Judge and a second application was made to him for a warrant.

That this application was opposed by these appellants on the grounds, among others, that there was NO VALID INDICTMENT upon which they could be tried, for the reason that the indictment had not been found and returned by a grand jury CONSTITUTED AND DRAWN IN ACCORDANCE WITH THE PROVISIONS OF THE STATUTES OF THE UNITED STATES, and that the finding of the Commissioner that there was probable cause to believe that an offence had

been committed was without force or effect, INASMUCH AS UNDER THE ORDER SENDING THE PROCEEDINGS BACK FOR FURTHER TESTIMONY, THE COMMISSIONER ACTED ONLY AS THE ARM OF THE COURT TO TAKE THE TESTIMONY, AND THAT THE QUESTION OF PROBABLE CAUSE SHOULD BE PASSED UPON BY THE DISTRICT JUDGE.

That the motion for a warrant was granted WITHOUT ANY FINDING OF PROBABLE CAUSE BY THE DISTRICT JUDGE, and an opinion was rendered, in which, among other things, it was stated that the question of illegality in the formation of the Grand Jury finding the indictment should not prevail, even though established as a matter of fact,

1st. BECAUSE THE QUESTION IS A NEW ONE, ARISING UPON THE CONSTRUCTION AND EFFECT OF AN IMPORTANT STATUTE AND NOT DECIDED OR IN ANY WAY PASSED UPON BY THIS COURT AS THE ULTIMATE AUTHORITY; AND

2d. BECAUSE UNDER THE RULING OF THIS COURT IN THE CASE OF AGNEW *v.* THE UNITED STATES (165 U. S., 36), THERE WAS AT LEAST SOME QUESTION WHETHER THE OBJECTION TO THE LEGALITY OF THE PROCEEDINGS HAD NOT BEEN WAIVED.

That as grounds for refusing to pass upon the question of probable cause it was further stated in the opinion that it was not for the Judge, on an application for removal, to compare different parts of the testimony in order to determine their relative weight or to substitute his judgment for that of the Commissioner, even though it might on the whole evidence be different; that the defendants had given a great deal of evidence "TENDING TO SHOW THAT "THEIR CONTRACTS WERE FAIRLY OBTAINED, THEIR "WORK WELL AND HONESTLY DONE, AND THAT THE "GOVERNMENT HAS NOT BEEN DEFRAUDED OF A "DOLLAR," and that the Government, on the other

hand, had given evidence tending to a contrary conclusion.

The petition further alleges that the imprisonment and detention of the appellants is without authority in law, and that the said proceedings before the Commissioner were illegal, and the warrant of removal was illegally issued and in violation of the FOURTH AND FIFTH ARTICLES OF AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES, AND SECTION 1, OF THE FOURTEENTH ARTICLE OF AMENDMENT THERETO, WHICH PROVIDE THAT THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS AGAINST UNREASONALE SEARCHES AND SEIZURES SHALL NOT BE VIOLATED; THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PERSON TO BE SEIZED; THAT NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL OR OTHERWISE INFAMOUS CRIME, UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, AND THAT NO PERSON SHALL BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW.

That the appellants were not in the Southern District of Georgia at the time the alleged Grand Jury finding the indictment was drawn, nor at the time it was presented and filed in the United States District Court for the Eastern Division of the Southern District of Georgia; that they were not informed of the drawing of such alleged Grand Jury prior to the time of the filing thereof; and that prior to their arrest on the warrant of Commissioner Shields, they had not been arrested and held to await the action of any grand jury in the Southern District of Georgia, or elsewhere, nor had they, prior to the proceedings on their appearance before said Commissioner, any opportunity to object to said Grand Jury, or any action by it.

That at the time of the drawing of said Grand

Jury, November 22d, 1899, Hon. Emory Speer was the United States District Judge for the Southern District of Georgia; that he drew the said alleged Grand Jury, and held the term of the court at which the said indictment was presented and filed; and by law is required to hold the several terms of the United States Court for the Eastern Division of the Southern District of Georgia, and will hold the term of said court for the second Tuesday in August, 1901, at which term and time these appellants were by said warrant of removal to appear for trial; and that unless the Circuit Court would hear and determine the questions relating to the illegality of the Grand Jury and its right to act in the premises, the said District Judge of the Southern District of Georgia would have before him, and be obliged to pass on, the question of the validity and legality of the orders made by him relating to the formation of said Grand Jury, and the legality of his own acts in drawing the same.

The petition further shows that at the time of the filing of said indictment, Marion Erwin was and now is, United States District Attorney for the Southern District of Georgia, and is also Assistant United States Attorney in charge of these proceedings in the Southern District of New York.

That while the appellants were in New York pending such removal proceedings and under bail, the said Marion Erwin caused to be served upon the appellants' attorney in those proceedings a notice as follows:

"Office of the United States Attorney,
"Southern District of Georgia
"Macon, Ga., March 5th, 1900.

"ABRAM J. ROSE, Attorney,
"New York City.

"You are hereby notified, as attorney for "Benjamin D. Greene, Edward H. Gaynor,

"John F. Gaynor and William T. Gaynor, in "the case of United States *v.* Benjamin D. "Greene and others, charged with conspiracy "to defraud, in which case the plaintiffs "above named represented by you are de "fendants, that the above case will be "called in the United States District Court "at Savannah, Georgia, on Monday, March "12th, 1900, at 10:30 o'clock A. M., in "order that the defendants to the in "dictment in said case may appear in per "son and interpose any objections which "they may desire to urge as to the empan "elling of the Grand Jury that returned the "true bill of indictment in said case, and "such other objections as they may make to "the validity of said indictment.

"Very respectfully,

"MARION ERWIN,
"United States Attorney."

That the said notice, together with the answer made by Mr. Rose thereto, was, upon motion of said Marion Erwin and by the direction of Judge Speer, ordered on file as a part of the record in the proceedings under the alleged indictment in the Southern District of Georgia, and which order is as follows:

"In the District Court of the United "States for the Eastern Division of the "Southern District of Georgia.

"UNITED STATES *vs.* "BENJAMIN D. GREENE, *et al.*	Indictment Conspiracy to Defraud. Filed December 8th, 1899.

"The defendants, Benjamin D. Greene,

"Edward H. Gaynor, John F. Gaynor, "William T. Gaynor and Michael A. Con- "nally, in the above stated case, being called, "the United States Attorney presents the "following described documents: Notice "from the said United States Attorney, under "date of March 5th, 1900, to Abram J. Rose, "Esq., attorney for said Benjamin D. Greene, "Edward H. Gaynor, John F. Gaynor and "William T. Gaynor, return served March "8th, 1900, that said case would be called "in this court on this the 12th day of March, "1900. The answer of the said Abram J. "Rose, under date of March 8th, 1900, "to said notice and a copy of the "answer of the said United States At- "torney to the said Abram J. Rose under "date of March 12th, 1900, also notice from "said United States Attorney to M. A. Con- "nally, Esq., under date of March 10th, "1900, that said case would be called on this "12th day of March, 1900, and return of "service thereon of March 10th, 1900, and "the said Benjamin D. Greene, Edward H. "Gaynor, John F. Gaynor and William T. "Gaynor not appearing, and the said Michael "Connally appearing:

"It is ordered by the Court that said docu- "ments hereto attached be filed with the "Clerk of this Court. In open court, March "12th, 1900.

"EMORY SPEER,
"*United States Judge.*"

The petition further alleges that as these appellants are informed and believe the said Marion Erwin claims and insists that because of their failure to appear pursuant to the above notice, they are barred and estopped in that court from questioning the

legality and validity of said alleged Grand Jury, and that unless the Circuit Court in the Southern District of New York would hear and pass on said questions they would be tried on an alleged indictment never found by any legally authorized Grand Jury, but presented and filed in court by a body of men in whose selection and drawing the statutes of the United States relating thereto were wholly disregarded and set at naught.

That said alleged Grand Jury finding said indictment was drawn from a jury box that did not have 300 names of persons therein qualified to act as jurors at the time of said drawing, and that said box was not prepared by a Jury Commissioner and Clerk of the Court by each putting in alternately the name of a person, as required by law.

The petition further shows that the alleged offence charged in said indictment is an infamous crime, and that their removal to answer the same without presentment or indictment by a Grand Jury would be in violation of the rights secured to them by the Constitution of the United States.

That the Marshal for the Southern District of New York, and persons acting under his orders and authority, are detaining these appellants, and are about to remove them to the Eastern Division of the Southern District of Georgia for trial upon the said pretended indictment, and in pursuance of the proceedings had before said Commissioner and the warrants of removal issued thereupon by the said District Judge, and that such detention is without authority in law, and that any further proceedings in pursuance thereof would be, and are, unlawful.

See Petition, pp. 1-6.

An application for the issuance of a writ of habeas corpus was made upon this petition to Hon.

E. Henry Lacombe, United States Circuit Judge for the Southern District of New York, and was denied.

See Order, Record, pp. 164-165.

A petition for an appeal from the order denying the application was allowed by Judge Lacombe, and it is upon such appeal that this proceeding now comes before this Court.

See Record, pp. 165-167.

Assignment of Errors.

The errors assigned are that the Court erred:

1. In denying the petitioners' application for a writ of habeas corpus.

2. In refusing to grant said application.

3. In deciding that it appears from the petition itself that the relators were not entitled to such writ.

4. In holding that the alleged Grand Jury which presented and filed the alleged indictment, all as mentioned in the petition, was a valid Grand Jury, or that it was legally and properly drawn.

5. In holding that the said alleged indictment stated an offence against the laws of the United States.

6. In holding that the United States District Court for the Southern District of Georgia has jurisdiction to try the petitioners under said alleged indictment.

7. In holding that the warrant of removal made by the United States District Judge for the South-

ern District of New York was issued upon a finding of probable cause.

8. In holding that the petitioners were in custody of the said William Henkel, United States Marshal in and for the Southern District of New York, and deprived of their liberty by him by due process of law.

9. In not holding the action of the said alleged Grand Jury, on the 8th day of December, 1899, in the Eastern Division of the Southern District of Georgia, was, so far as the petitioners were concerned, of no force and effect, and that the alleged indictment filed by such alleged Grand Jury furnished no ground or basis upon which the petitioners could be tried or removed from the Southern District of New York for trial.

See Assignment of Errors, pp. 167-168.

POINTS.

BY THE DENIAL OF THE APPLICATION FOR A WRIT THE CIRCUIT COURT, IN EFFECT, HOLDS THAT A PERSON CHARGED WITH AN INFAMOUS CRIME MAY BE REMOVED FOR TRIAL UPON AN ALLEGED INDICTMENT FOUND BY A BODY OF MEN NOT CONSTITUTING A LEGAL GRAND JURY DRAWN IN CONFORMITY WITH THE STATUTES OF THE UNITED STATES REGULATING THE PRACTICE AND PROCEDURE IN THAT REGARD, BUT, ON THE CONTRARY, EMPANELLED IN TOTAL DISREGARD OF THOSE PROVISIONS; AND WITHOUT ANY FINDING OF PROBABLE CAUSE BY THE DISTRICT JUDGE ISSUING THE WARRANT OF REMOVAL AFTER THE RETURN AND REPORT OF THE PROCEEDINGS TO HIM UNDER AN ORDER DIRECTING THE COMMISSIONER SIMPLY TO TAKE FURTHER TESTIMONY UPON THAT

QUESTION. THAT THEREBY NO CONSTITUTIONAL RIGHT OF THESE APPELLANTS SECURING THEM IN THEIR PERSONS AGAINST UNREASONABLE SEIZURES, AND PROVIDING THAT NO WARRANT SHALL ISSUE BUT UPON PROBABLE CAUSE, AND THAT NO PERSON MAY BE HELD TO ANSWER FOR AN INFAMOUS CRIME UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, AND SHALL NOT BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW, WAS VIOLATED, DENIED OR INFRINGED UPON.

ARGUMENT.

Point I.

It was the duty of the Circuit Court to inquire by habeas corpus into the removal proceedings for the purpose of determining whether the District Court for the Southern District of Georgia had jurisdiction of the offense to answer for which the removal was sought; and if any proceedings necessary to confer jurisdiction were unconstitutional the denial of the writ was error reviewable by this Court.

First.—The statute regulating the procedure in cases of removal of offenders against the United States provides that the offender may "by any Jus-"tice or Judge of the United States, or by any Com-"missioner of a Circuit Court to take bail, or by any "Chancellor, Judge of a Supreme Court or Superior "Court, Chief or first Judge of Common Pleas,

"Mayor of the City, Justice of the Peace, or other "magistrate of any State where he may be found "AND AGREEABLY TO THE USUAL MODE OF PROCESS "AGAINST OFFENDERS IN SUCH STATE, and at the ex- "pense of the United States be arrested and im- "prisoned or bailed as the case may be for trial "before such Court of the United States AS BY "LAW HAS COGNIZANCE OF THE OFFENSE"; and that where any offender is committed in any district other than that where the offense is to be tried, it shall be the duty of the Judge of the district where such offender is imprisoned to issue, and of the Marshal to execute a warrant for his removal to the district where the trial is to be had.

See Revised Statutes of the United States, Section 1014.

It has been repeatedly adjudged that the duty of the Judge of the district to whom application is made for removal is not simply perfunctory and ministerial, but judicial; and that the statute should be liberally construed in favor of personal liberty, and to prevent unwarranted seizures of persons by criminal process.

It is always open to the prisoner to show that no offense against the United States has been committed, or that the indictment is bad in form, or that the offense charged cannot be legally tried in the district to which removal is sought, or that it is outlawed, or equally triable where the offender resides and is found.

In the MATTER OF BUELL Circuit Judge Dillon said:

> "In a country of such vast extent as ours "it is no light matter to arrest a supposed "offender and on the mere order of an in- "ferior magistrate remove him hundreds, it "may be thousands, of miles for trial. * * *

"Mere technical defects in an indictment "should not be regarded, but a district judge "who should order the removal of a prisoner "when the only probable cause relied on or "shown was an indictment, and that indict- "ment failed to show any offense against "the laws of the United States, or showed "an offense not committed or triable in the "district to which the removal is sought, "would misconceive his duty and fail to pro- "tect the liberty of the citizen."

In re Buell, 3 Dillon, 116 (Federal cases No. 2102).

The same view was expressed by Circuit Judge Lacombe in the MATTER OF TERRELL:

"There is good cause for holding," says the learned Judge, "that this power should be ex- "ercised liberally whenever the Judge before "whom the questions are raised on applica- "tion for a warrant of removal, or on a ha- "beas corpus, is satisfied, from the face of the "indictment, that were such indictment be- "fore him for trial and demurred to, he would "quash it. This is a country of vast extent, "and it would be a grave abuse of the "rights of the citizens, if, when charged "with alleged offenses committed, perhaps, "in some place he had never visited, he "were removed to a district thousands of "miles from his home to answer to an in- "dictment fatally defective on any mere "theory of a comity which would require "the sufficiency of the indictment to be test "ed only in the particular court in which it "is pending."

In the Matter of Terrell, 51 Fed. Rep., 213.

And in the MATTER OF DOIG, District Judge Hoffman observed that where a District Judge is applied to for a warrant of removal and it appears from the indictment on which the warrant is asked that the act alleged does not constitute an offense against the United States, or that no trial can be had in the district to which the removal is sought, it is his duty to refuse the warrant.

In re Doig, 4 Fed. Rep., 193.

And District Judge Hammond, in UNITED STATES *v.* BRAWNER, referring to the power of the District Judge to refuse removal, expressed similar views and said that the very purpose of conferring the power upon the District Judge to order a removal, was to secure the judicial sanction of a supervisory judge for the action of the committing magistrate; that the necessary implication from the method of procedure adopted by the statute "is that the "'judge of the district,' whether it be the District "Judge or some other, as is intimated *In re* Bailey, "1 Woolw., 422, it may be, must judicially deter- "mine whether the prisoner shall be taken to "another district for trial and that he may refuse "his warrant where it appears that the removal "should not be made or where he would admit the "party to bail."

United States *v.* Brawner, 7 Fed. Rep., 86.

In UNITED STATES *v.* LEE, District Judge Wellborn summed up the facts necessary to authorize a warrant of removal, as follows:

1. That the defendant has been committed in the district from which removal was sought.

2. That the indictment sufficiently charges an offense against the United States.

3. THAT THE COURT TO WHICH REMOVAL IS SOUGHT HAS JURISDICTION OVER THE OFFENSE.

"The first of these requirements," he said, "is "clearly expressed in the statute—said Section "1014; the other two, although not expressed in "terms, are necessarily implied."

United States *v.* Lee, 84 Fed. Rep., 26.

It was then, we submit, the duty of the District Judge to whom application for removal was made to inquire whether the District Court of Georgia had, in the words of the statute, cognizance of the offense, and if it affirmatively appeared that the proceedings taken to confer jurisdiction were unconstitutional, he should have refused a warrant and discharged the appellants.

Second.—IT WAS ALSO THE RIGHT AND THE DUTY OF THE CIRCUIT COURT, BY HABEAS CORPUS TO INQUIRE INTO THE QUESTION OF JURISDICTION OF THE DISTRICT COURT OF GEORGIA, AND TO DISCHARGE THE APPELLANTS, IF THE PROCEEDINGS TAKEN AGAINST THEM IN THAT COURT WERE WITHOUT AUTHORITY.

This was so expressly decided by this Court in

Horner *v.* United States, 143 U. S., 207.

It is also the established rule that the courts of the United States have the right to interpose by writ of habeas corpus and discharge a prisoner when the proceedings taken against him have violated or would infringe upon his constitutional rights.

Ex parte Lange, 85 U. S., 163.
Ex parte Siebold, 100 U. S., 404.
Ex parte Ayers, 123 U. S., 443.
Ex parte Bain, 121 U. S., 1.
Ex parte Sawyer, 124 U. S., 250.
Ex parte Snow, 130 U. S., 274.
Ex parte Neilsen, 131 U. S., 176.

If, then, any constitutional immunity of the appellants was violated in the removal proceedings, or will be violated by their removal to the State of Georgia for trial, the application for the writ was improperly denied, and the order denying the same is reviewable by direct appeal to this Court.

See Act of March 3, 1891, 23 Statutes at Large, 826.
Carter *v.* Roberts, 177 U. S., 496.

Point II.

The constitutional right of the appellants to be secure in their persons against unreasonable seizures and not to be deprived of their liberty without due process of law, has been and will be violated and infringed upon by their removal to the State of Georgia for trial, for the reason that by the record in the removal proceedings and by the petition in this proceeding, it expressly appears that there is nothing before the District Court for the Southern District of Georgia which they can be held to answer so far as the offense charged against them is concerned, because the indictment was not found by a legally constituted Grand Jury empanelled and sworn according to the provisions of the Revised Statutes of the United States.

First.—THE OFFENSE WITH WHICH THESE APPELLANTS ARE CHARGED IS AN INFAMOUS CRIME.

The indictment, upon which the removal proceedings were based, charges these appellants with conspiracy to defraud the United States under Sections 5438 and 5440 of the Revised Statutes, the punishment for which may be a fine of ten thousand dollars or imprisonment for five years at hard labor.

See Revised Statutes, Sections 5438–5440.

By the express decisions of this Court such an offense is an infamous crime.

Ex parte Wilson, 114 U. S., 417.
Mackin *v.* United States, 117 U. S., 348.
Ex parte Bain, 121 U. S., 1.

Second.—By the Fifth Article of Amendment to the Constitution, it provided that "No person shall "be held to answer for a capital OR OTHERWISE INFAMOUS CRIME UNLESS ON PRESENTMENT OR INDICTMENT OF A GRAND JURY, except in cases arising in "the land or naval forces, or in the militia, when "in actual service, in the time of war or public "danger; nor shall any person be subject for the "same offense to be twice put in jeopardy of life or "limb; nor shall be compelled in any criminal case "to be a witness against himself, NOR BE DEPRIVED "OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE "PROCESS OF LAW."

See Constitution, Fifth Amendment.

The causes which led up to this express enactment in the Constitution are well known.

The colonists were familiar with the history of

the English people and the abuses which made necessary Magna Charta and the Bill of Rights.

They knew that Magna Charta had secured the right to a jury trial, but they were also alive to the disregard of its provisions by the House of Tudor, as well as the attempts by the then English King to transport them "beyond the seas to be tried for pretended offenses," and thus deprive them of the right to a trial by a jury of their peers in the place where the act was committed, and as said by Mr. Justice Davis, "the history of the world had taught "them that what was done in the past might be "attempted in the future."

Ex parte Milligan, 71 U. S., 2.

It was not strange, therefore, that they should insist that their rights should be guarded by provisions whose meaning could not be misconstrued nor evaded.

In the body of the Constitution itself it was provided that "the trial of all crimes, except in cases of "impeachment, shall be by jury, and such trial "shall be held in the State where the said crimes "shall have been committed; but when not com-"mitted, within any State, the trial shall be at "such place or places as the Congress may by "law have directed."

Clause 3, Article 3.

Speaking of the original provisions, Mr. Justice Story says that although these provisions of a trial by jury in criminal cases were thus constitutionally preserved to all citizens, "the jealousies and alarms of opponents of the Constitution were not quieted. They insisted that a Bill of Rights was indispensa-

ble, and that upon this further auxiliary rights ought to have been secured."

See Story's Constitution, 5th Edition, Section 1782.

So jealous were the people of any limitation of this great right that it was claimed that the Constitution should define the right of trial by jury in both civil and criminal cases.

It was argued that the mode of trial by jury was well settled and needed no further specification, but this did not satisfy the claimants for further provisions.

It was also pointed out that in civil cases different modes of trial were in use among the several states and that it would be impossible to assimilate the practice.

The latter objection was at last yielded although not without strong opposition.

In trials for crime, however, the opposition could not be appeased and the outcome was the enactment of the Fifth and Sixth amendments.

Third.—IN THE PROSECUTION OF INFAMOUS CRIMES THIS COURT HAS VIGOROUSLY UPHELD THE PROVISIONS OF THE CONSTITUTION RESPECTING THE NECESSITY OF A PRESENTMENT OR INDICTMENT BY A GRAND JURY AS AN ABSOLUTE PREREQUISITE TO THE JURISDICTION OF THE COURT TO PUT THE ACCUSED UPON HIS TRIAL.

Ex parte Wilson (*supra*).
Mackin *v.* U. S. (*supra*).
Ex parte Bain (*supra*).

In *ex parte* BAIN (*supra*) the petitioner had been indicted under Section 5209 for making a false report as cashier of the Exchange National Bank of Norfolk to the Comptroller of the Currency.

After the finding of the indictment the defendant *demurred and his demurrer was sustained.*

Thereafter, upon motion of the Government, it was ordered by the Court that the indictment be amended, and the petitioner entered his plea of not guilty, was tried and a verdict of guilty found against him.

He petitioned for a writ of habeas corpus on the ground that no indictment for the offence upon which he had been tried had been found by a grand jury as provided in the Fifth Article of Amendment to the Constitution. This Court held that he was entitled to the writ.

Mr Justice Miller writing the opinion says,

> "It is never to be forgotten that in the "construction of the language of the Consti- "tution here relied on, as, indeed, in all other "instances where construction becomes nec- "essary, we are to place ourselves as nearly "as possible in the condition of the men who "framed that instrument. Undoubtedly the "framers of this Article had for a long time "been absorbed in considering the arbitrary "encroachments of the Crown on the liberty "of the subject, and were imbued with the "common law estimate of the value of a "grand jury as part of its system of criminal "jurisprudence. They, therefore, must be "understood to have used the language which "they did in declaring that no person shall "be called to answer for any capital or other- "wise infamous crime, except upon an in- "dictment or presentment of a Grand Jury "in the full sense of its necessity and of its "value. *We are of the opinion that an in- "dictment found by a grand jury was indis- "pensable to the power of the Court to try the "petitioner for the crime with which he was*

"*charged.* The sentence of the Court was "that he should be imprisoned in the peni- "tentiary at Albany. The case of *ex parte* "Wilson (114 U. S., 418), and the later one of "Mackin *v.* U. S., (117 U. S., 348), establish "the proposition that this prosecution was for "an infamous crime within the meaning of "the constitutional provision. It only re- "mains to consider whether this change in "the indictment deprived the Court of the "power of proceeding to try the petitioner "and sentence him to the imprisonment pro- "vided for in the Statute.

"We have no difficulty in holding that the "indictment on which he was tried was no "indictment of a grand jury. The decis "ions which we have already referred to as "well as sound principle, require us to hold "that after the indictment was changed, it "was no longer the indictment of the Grand "Jury who presented it. Any other doctrine "would place the rights of the citizens which "were intended to be protected by the con- "stitutional provision, at the mercy or con- "trol of the court or prosecuting attorney; "for if it be once held that changes can "be made by the consent or the order of the "Court in the body of the indictment as "presented by the Grand Jury and the "prisoner can be called upon to answer to "the indictment as thus changed, the re- "striction which the Constitution places "upon the power of the Court in regard to "the prerequisite of an indictment in reality "no longer exists. It is of no avail, under "such circumstances to say that the Court "still has jurisdiction of the person and of "the crime; for though it has possession of "the person and would have jurisdiction of

"the crime if it were properly presented by "*indictment, jurisdiction of the offence is* "*gone*, and the Court has no *right to pro-* "*ceed further in the progress of the case for* "*want of the indictment.* IF THERE IS NOTH- "ING BEFORE THE COURT WHICH THE "PRISONER, IN THE LANGUAGE OF THE CON- "STITUTION, CAN BE "HELD TO ANSWER," "HE IS THEN ENTITLED TO BE DISCHARGED SO "FAR AS THE OFFENCE ORIGINALLY PRESENTED "TO THE COURT BY THE INDICTMENT IS CON- "CERNED. THE POWER OF THE COURT TO "PROCEED TO TRY THE PRISONER IS AS MUCH "ARRESTED AS IF THE INDICTMENT HAD BEEN "DISMISSED OR A *nolle prosequi* HAD BEEN "ENTERED. There was nothing before the "Court on which it could hear evidence or "pronounce sentence."

Bain *v.* U. S. (*supra*).

Judge Speer, before whom these appellants will be tried if removed to Georgia, referring to the decisions above mentioned, said:

"*Startling as is the proposition to a people* "*who have been habituated to prosecutions* "*upon information in cases of this character*, "the practice must cease, and hereafter the "courts of the United States will take no "action in the large class of cases where "imprisonment in the State penitentiary "may result, save after presentment or in- "dictment by the Grand Jury."

U. S. *v.* Johannsen, 35 Fed. Rep., 411.

Fourth.—THE DISTRICT COURT OF THE SOUTHERN DISTRICT OF GEORGIA HAS NO COGNIZANCE OF THE OFFENSE AND NO JURISDICTION TO TRY THESE APPEL LANTS THEREON, BECAUSE IT AFFIRMATIVELY AP

PEARS THAT THE PROVISIONS OF THE STATUTES REGULATING THE PROCEDURE IN THE DRAWING OF GRAND AND PETIT JURIES IN THE COURTS OF THE UNITED STATES WERE WHOLLY DISREGARDED AND VIOLATED IN THE EMPANELLING OF THE GRAND JURY FINDING THE ALLEGED INDICTMENT UPON WHICH THE REMOVAL PROCEEDINGS WERE BASED.

1st. By the Act of June 30, 1879, Chapter 52, Section 2 (21 Statutes at Large, page 43), it is provided:

> "That all such jurors (in any court of the "United States), grand and petit, including "those summoned during the session of the "Court, shall be publicly drawn from a box "containing at the time of EACH DRAWING "THE NAMES OF NOT LESS THAN THREE "HUNDRED PERSONS possessing the qualifica- "tions prescribed in Section 800 of the Re- "vised Statutes, WHICH NAMES SHALL BE "PLACED THEREIN BY THE CLERK OF SUCH "COURT AND A COMMISSIONER to be appointed "by the Judge thereof, which commissioner "shall be a citizen of good standing residing "in the district in which such court is held, "and a well known member of the principal "political party in the district in which the "Court is held opposing that to which the "Clerk may belong, THE CLERK AND SUCH COM- "MISSIONER EACH TO PLACE ONE NAME IN SAID "BOX ALTERNATELY, without reference to "party affiliations, until the whole number "required shall be placed therein. * * * No "person shall serve as a petit juror more "than one term in any one year, AND ALL "JURORS TO SERVE IN COURTS AFTER THE "PASSAGE OF THIS ACT SHALL BE DRAWN IN "CONFORMITY HEREWITH."

See Act of June 30th, 1879, 21 Statutes at Large, page 43.

Section 802 of the Revised Statutes provides:

> "Jurors shall be returned from such parts
> "of the district from time to time as the
> "Court shall direct so as to be most favora-
> "ble to an impartial trial, and so as not to
> "incur unnecessary expense or unduly to
> "burden the citizens of any part of the
> "district with such service."

See Revised Statute, Section 802.

These are the requirements of the law which must be strictly followed, in order that there may be a jury qualified to act in the courts of the United States.

2d. *The body of men finding the indictment made the basis of the removal proceedings, was drawn in total disregard of the statutory provisions.*

The undisputed testimony on the removal proceedings, and made part of the petition in this proceeding, shows:

First.—THAT THE JURY WAS NOT DRAWN FROM A BOX CONTAINING, AT THE TIME OF THE DRAWING, THE NAMES OF NOT LESS THAN THREE HUNDRED PERSONS.

Second.—THAT THE NAMES IN SAID BOX WERE NOT PLACED THEREIN BY THE CLERK OF THE COURT AND THE COMMISSIONER APPOINTED BY THE JUDGE THEREOF, BUT BY THE DEPUTY CLERK OF THE COURT AND THE COMMISSIONER, ALTHOUGH THE CLERK WAS IN NO WAY DISABLED TO ACT.

Third.—THAT THE DEPUTY CLERK AND THE COMMISSIONER DID NOT EACH PLACE ONE NAME IN SAID BOX ALTERNATELY, BUT BY THE HANDFUL.

Fourth.—THAT THE DISTRICT JUDGE RETURNED TO THE BOX NAMES ALREADY DRAWN THEREFROM BY HIM.

In order to bring specifically before the Court the illegality in the making up of the jury box and the empanelling of the Grand Jury, reference to the evidence given on the removal proceedings will be made.

It appears that on the 26th of January, 1897, an order was entered by the Judge of the District Court for the Southern District of Georgia, Judge Speer, appointing a Jury Commissioner for the Eastern Division of said district, and directing a revision of the jury box for that division.

The Eastern Division of the Southern District comprises twenty-eight counties, but the District Judge, acting under the provisions of Section 802, directed that the revision should be made by putting into the box only the names of jurors from fourteen counties, namely: Chatham, Bryan, Liberty, Ware, Glynn, Wayne, Pierce, Clinch, Lowndes, Brooks, Thomas, Decatur, Effingham and Bulloch.

See Order, Record, p. 84, fol. 156.
See testimony of Gillespie, Record, p. 97, fol. 183.

The counties of Chatham and Glynn are the most populous in the entire Eastern Division.

After his appointment the Jury Commissioner, Mr. Elliott, qualified, and in April or May, 1897, he and the Clerk of the Court, and the Deputy Clerk, met to revise the jury box.

According to the testimony of Deputy Clerk Gillespie, the names of persons from the fourteen counties named in the order were returned by the clerks of the different counties.

The names so returned were written on sheets of

paper, part of them by Deputy Clerk Gillespie, and part of them by Jury Commissioner Elliott.

The Clerk of the Court, Mr. King, although present and in no way disabled, did not take much active part in the proceedings.

The sheets on which the names were written were cut into slips by the Deputy Clerk, each containing a name. These slips were put into the jury box by Deputy Clerk Gillespie and the Jury Commissioner by the handful, and not alternately one by one, as required by the statute.

In this manner 562 names were put into the box.

Mr. Gillespie's testimony is as follows:

"Q. HOW MANY NAMES WERE THERE?

"A. 562.

"Q. WHAT WAS DONE WITH THOSE TICKETS?

"A. I MADE THEM MYSELF AND PUT THEM "IN THE BOX; MR. ELLIOTT AND MYSELF.

Q. "Mr. Elliott and yourself put them in "the what box?

"A. In the District Court jury box.

"Q. In the District Court jury box? When "was that?

"I have not got the date. It was about "the first of April.

"Q. What year?

"A. 1897.

"Q. At the time that was done who was "present?

"A. Mr. King, the clerk.

"Q. And who else?

"A. Mr. Elliott and myself.

"Q. And yourself. In putting them in "how did you put them in. Tell us what "was done with reference to that.

"A. Well, I made them out on typewrit-"ten paper, in two columns. I cut them "this way, and cut them that way, and "folded them (indicating).

"Q. That made the tickets?

"A. That made the tickets. Mr. Elliott "and I put them in alternately; he would put "in some, and I would put in some others.

"Q. YOU MEAN HE WOULD PUT IN A "BUNDLE?

"A. HE WOULD PUT IN A BUNCH AS I FOLDED "THEM, AND I WOULD PUT IN A BUNCH AS I "FOLDED THEM. They were made out on type-"written paper with space between, down this "side of the sheet and down the other side "and cut in two, then cut cross-wise and "then folded once.

"Q. When folded the names could not be "seen?

"A. No, sir.

"Q. Mr. King was present during all this "time while you were doing this?

"A. While we were putting them in the "box.

"Q. Did he put any in the box himself?

"A. No, sir. Mr. Elliott and I did it my-"self. Mr. King supervised it.

"Q. Mr. King was not sick or disabled?

"A. Oh, no. He was simply sitting there "present. He turned the work over to me, "of course.

"Q. But he was present in the room all the "time?

"A. He was in the room.

"Q. And you cut up a few sheets of these "and folded them?

"A. Yes, sir.

"Q. And Mr. Elliott would cut up a few "sheets of them and fold the tickets?

"A. Yes.

"Q. And then you would put in the bunch "you had folded and he would put in the "bunch he folded?

* * * * * *

"Q. NOW, DID YOU PUT IN ONE TICKET "ALONE, A SINGLE TICKET, AND THEN MR. "ELLIOTT FOLLOWING YOU PUT IN ANOTHER "one?

"A. NO, SIR.

"Q. AND THEN YOU PUT IN A THIRD?

"A. No.

"Q. AND HE PUT IN THE FOURTH AND SO ON "UNTIL THEY WERE ALL PUT IN?

"A. NO, SIR. THEY WERE BUNDLED UP "UNTIL WE GOT A PILE OF THEM AND THEN "WE PUT THEM IN THE BOX TOGETHER.

"Q. Now, from that time until the first of "January, 1900, was there any other revision "of the jury box for the Eastern Division of "the Southern District of Georgia?

"A. No, sir.

"Q. That was the last and only one that "was ever made by Mr. Elliott?

"A. Yes, sir.

"Q. First and last and only one?

"A. Yes, sir."

See testimony of Gillespie, Record, pages 115-117, folios 208-210.

Of the 562 names put into the box 291 were from the county of Chatham and 14 from the county of Glynn, leaving 257 names from the remaining twelve counties.

See testimony of Gillespie, page 117, folio 211.

The first jury from this box was drawn in July, 1897, twenty-eight grand jurors and sixteen petit jurors, a total of forty-four.

A second jury was drawn in February, 1898, thirty names for the grand jury and nineteen for the petit jury, a total of forty-nine.

A third was drawn in January of 1899, thirty names for the grand jury and eighteen for the petit, a total of forty-eight.

A fourth was drawn in May, 1899, thirty names for the grand jury, twenty-six for the petit, a total of fifty-six; making a sum total of one hundred and ninety-seven names drawn from the box up to that date.

Of these, ninety-seven were from Chatham County and two from Glynn County. The balance, ninety-eight, were from the other twelve counties named in the order.

See testimony of Gillespie, Record, pages 117-135.

Taking the one hundred and ninety-seven names drawn from the five hundred and sixty-two originally put into the box, left three hundred and sixty-five names in the box after the drawing of the jury in May, 1899.

On the 22d of November the United States District Attorney, Mr. Erwin, wrote the following letter to Judge Speer of the District Court:

" DEPARTMENT OF JUSTICE,
" Office of United States Attorney,
" Southern District of Georgia.
" MACON, GEORGIA, Nov. 22, 1899.

" To the
" Hon. EMORY SPEER,
" Judge of the District Court of the United States for the Southern District of Georgia.

" *Sir:*

" In pursuance of the provisions of Section " 810 of the Revised Statutes, I have the " honor to state that at the approaching ses-

" sion of the District Court, to be holden in
"the City of Savannah, on December 4th
" next, a grand jury will be needed to pass
" upon certain cases, the most important of
" which involve matters touching frauds al-
" leged to have been committed in river and
" harbor improvements carried on by the
" Government in and about the Cities of Sa-
" vannah and Brunswick, and which received
" much discussion and publicty among
" the people in the counties in which tho e
" cities are situated, making it more difficult
" and expensive to obtain an impartial trial
" of such matters from jurors drawn from
"these counties than if the jury be drawn
" from the other counties of the Eastern
" Division of the district and a jury drawn
" from the latter mentioned counties would
" be most favorable to an impartial trial. On
" behalf of the United States, I therefore re-
" spectfully request that the Court will exer-
" cise the discretion reposed in it by Section
" 802, Revised Statutes, and have grand jur-
" ors for said session returned from the coun-
" ties of the Eastern Division of the District
" other than the Counties of Chatham and
" Glynn.

" Respectfully,

" MARION ERWIN,

" *U. S. District Attorney.*"

Upon receipt of this letter, Judge Speer, on November 22, 1899, made the following order.

" Upon consideration of the attached notice
" from the United States Attorney and the
" matters therein stated, it is ordered by the
" Court that a grand jury be drawn from
" the jury box of the Eastern Division of the

"District and summoned to attend the session "of the Court to be holden in the City of "Savannah on December 4th, 1899, and that "such jury be returned from the counties of "said Eastern Division, other than the "Counties of Chatham and Glynn, it appear- "ing to the Court that such return of jurors "will be most favorable to an impartial trial "and prevent the incurring of unnecessary "expense.

"In open Court, Macon, Ga., November "22, 1899."

See Record, pages 95-96.

On the same day the Grand Jury which found the indictment in question was drawn at Macon, in the Western Division, by the United States District Judge, assisted by the United States Marshal.

At that time, as we have said, there were but three hundred and sixty-five names left in the jury box, which had not previously been drawn. Of these there were two hundred and six names of persons from Chatham and Glynn Counties, being the difference between the whole number from those counties originally put in the box, three hundred and five, and ninety-nine jurors previously drawn. These two hundred and six names were disqualified by the order of November 22, 1899, and left qualified names in the box on that date, the difference between three hundred and sixty-five names not previously drawn and two hundred and six from the counties of Chatham and Glynn, viz., one hundred and fifty-nine names.

The condition of the jury box on November 22, 1899, can best be shown by the following statement:

Names originally put in in April or May, 1897,		562
Names drawn previous to November 22, 1899,		197
Names left,		365
Of these there were disqualified by the order of November 22, 1899, the names originally put in from Chatham and Glynn counties,	305	
Previously drawn from those counties,	99	206
Leaving qualified names in the box on November 22, 1899,		159

In other words, there were only one hundred and fifty-nine names in the box from the twelve remaining counties of the Eastern Division after excluding the names from Chatham and Glynn counties.

From these names the body of men finding the indictment in this case was drawn.

See testimony of Gillespie, Record, pages 136-137.

In view of the importance of the questions coming before the November Grand Jury and which the United States Attorney considered warranted the exclusion of all citizens from the Counties of Chatham and Glynn in order to secure an impartial trial, we submit, the order of November 22d, made by the District Judge, required that there should be a revision of the jury list and that a new jury box should be made containing the names of qualified jurors from the whole number of counties in the Eastern Division, excluding Chatham and Glynn, and not simply the exclusion of the names of jurors from those two counties originally put into the jury box more than two years previously.

The order read "that jurors to be returned from " the counties of said Eastern Division other than " the counties of Chatham and Glynn."

See Order Record, pp. 95–6.

This would seem to require that the jurors should be returned from the twenty-eight counties in the Eastern Division, excluding only Chatham and Glynn.

The jury box made up in the spring of 1897, included names from only twelve counties, after excluding Chatham and Glynn.

The provisions of Section 802, under which the order purports to have been made, moreover, did not authorize the exclusion of names already returned and placed in the box under the order of January 26, 1897, directing a revision of the jury box. That section applies to the *preparation* of the jury lists—not to the drawing of a particular jury. After the lists have been prepared the Judge has no right to pick and choose, but must draw his juries from the whole number of names in the box.

No pretense, however, is made of any compliance with this order by the preparation of a new jury box. As a matter of fact, no new jury box could have been made at that time, because Jury Commissioner Elliott had resigned and no new Commissioner for the Eastern Division had been appointed.

See testimony of Gillespie, Record, p. 99, fols. 185–186

The Government is thus on the horns of a dilemma: If the order of November 22d required the making up of a new box, this concededly was not done. If it did not require the making up of a new jury box it was not authorized, and jurors from Chatham and Glynn were improperly excluded.

But even if the order of November 22d, 1899, did not require the preparation of a new box, which should contain at least three hundred names to be taken from twenty-six counties, then the drawing from the box as originally prepared and depleted by the previous drawings, and by the exclusion of persons from Chatham and Glynn counties, was illegal, because as we have shown, there were only left in the box one hundred and fifty-nine qualified jurors.

On cross-examination it was sought to be shown by the United States Attorney that ballots containing the names of jurors prior to November 23d, 1898, were returned to the box by District Judge Speer on the 22d day of November, 1899, and that, therefore, the number in the box was greater than one hundred and fifty-nine.

Even if we assume, for the purpose of argument, that Judge Speer did return all the names drawn from the twelve counties, other than Chatham and Glynn, named in the order of January 26th, 1897, the number would still be short of the requirements of the statute, for there would only be two hundred and eleven qualified names in the box.

It was shown by the testimony that from the twelve counties, other than Chatham and Glynn, during the time more than one year prior to November, 1899, fifty-two names had been drawn as jurors. Even if these were returned by the District Judge and added to the one hundred and fifty-nine, there would still be only two hundred and eleven qualified names in the box.

Moreover, we insist, that if Judge Speer did return those names to the box HIS VERY ACT INVALIDATED THE ENTIRE DRAWING, as under the express and positive provisions of the statute, no one has the right to put a name in the box EXCEPT THE CLERK OF THE COURT AND THE JURY COMMISSIONER.

TO ALLOW ANY PERSON, OTHER THAN THOSE EXPRESSLY NAMED IN THE STATUTE TO PLACE A NAME IN THE JURY BOX WOULD OPEN THE DOOR TO ALL SORTS OF FRAUD AND ILLEGALITY IN THE EMPANELLING OF JURORS, TO PREVENT WHICH THE EXPLICIT AND UNAMBIGUOUS PROVISIONS OF THE STATUTE WERE ENACTED.

Then, too, the express direction of the statute that the names be placed in the box ONE BY ONE ALTERNATELY BY THE CLERK AND THE JURY COMMISSIONER was completely ignored.

This provision is one of the most important in the statute. It is the way deemed best by Congress to prevent the "packing" of the jury box with names other than those on the list. Its purpose is to make the placing of the names in the box a deliberate and careful proceeding by the Clerk and Commissioner, and to secure jurors without reference to political affiliations.

The statute also expressly provides that the Jury Commissioner must belong to the opposite political party from the Clerk, showing the intention of Congress to make the duty a personal one to be performed by the individuals expressly nominated, and not by deputy or proxy.

In making up the box in question the names were placed therein in bunches by the handful by the DEPUTY CLERK and Commissioner, an utter and vital disregard of the plain and unambiguous provisions of the statute.

To sum this all up we have a jury box prepared in utter disregard of the requirements of the law.

That did not at the time of the drawing under any circumstances contain the number of names required by the law; and that had been tampered with by the putting in of names by a person not authorized to do so.

How can a body of men drawn in defiance of

express statutory requirements be a lawful Grand Jury?

How can any action of theirs be legal or be deemed the due process of law required by the Constitution?

How can a finding by such a body have any pos sible force or effect as the presentment or indictment by a Grand Jury guaranteed to every person by the Constitution before he can be called upon to answer for an infamous crime?

How can these appellants be removed to a distant State to answer for an alleged offense found against them by such an illegally constituted body of men?

Fifth.—THE PROVISIONS OF THE STATUTE REGULATING THE EMPANELLING OF A GRAND JURY ARE MANDATORY, AND A FAILURE TO COMPLY THEREWITH RENDERS AN INDICTMENT INVALID, AND ANY PROCEEDINGS BASED THEREON ILLEGAL AND VOID.

In order concisely to show the illegalities in the drawing of the Grand Jury finding the indictment in the case at bar, we will repeat, in parallel columns, the provisions of the statute regulating jury procedure and the proceedings taken in the Southern District of Georgia.

The Statutory Requirements.	**The Proceedings Empaneling the Grand Jury in Question.**
1. "THAT ALL SUCH JURORS * * * SHALL BE PUBLICLY DRAWN FROM A BOX CONTAINING, AT THE TIME OF EACH DRAWING, THE NAMES OF NOT LESS THAN THREE HUNDRED PERSONS."	1. ON NOVEMBER 22D, 1899, THE DAY OF THE DRAWING OF THE GRAND JURY, THE NAMES OF ONLY 159 QUALIFIED JURORS WERE IN THE BOX FROM WHICH THE JURY WAS EMPANELED, EXCLUDING

THE JURORS PREVIOUSLY DRAWN FROM COUNTIES OTHER THAN CHATHAM AND GLYNN; AND INCLUDING THE NAMES OF THOSE PREVIOUSLY DRAWN FROM SUCH OTHER COUNTIES, 211 NAMES.

2. "WHICH NAMES SHALL HAVE BEEN PLACED THEREIN BY THE CLERK OF SUCH COURT AND A JURY COMMISSIONER."

2. THE NAMES HAD NOT BEEN PLACED IN THE JURY BOX BY THE CLERK OF THE COURT AND THE JURY COMMISSIONER, BUT BY THE DEPUTY CLERK AND THE JURY COMMISSIONER, ALTHOUGH THE CLERK WAS PRESENT AND IN NO WAY DISABLED TO ACT. THE DISTRICT JUDGE, MOREOVER, HAD, AFTER THE ORIGINAL FORMATION OF THE JURY BOX, RETURNED NAMES THERETO OF JURORS DRAWN BY HIM IN THE DRAWING OF JURIES THEREFROM.

3. "THE CLERK AND SAID COMMISSIONER EACH TO PLACE ONE NAME IN SAID BOX ALTERNATELY."

SEE ACT OF JUNE 30TH, 1879.

21 STATUES AT LARGE, P. 143.

3. THE NAMES WERE NOT PLACED IN THE BOX ALTERNATELY, ONE BY THE CLERK AND ONE BY THE JURY COMMISSIONER, BUT IN BUNCHES BY THE HANDFUL BY THE DEPUTY CLERK AND THE JURY COMMISSIONER.

It is entirely unnecessary to argue that the provisions of the statute requiring not less than three hundred names at the time of each drawing, which names shall have been put in the box by the Clerk of the Court and the Jury Commissioner alternately one by one, are mandatory. THE ACT ITSELF SO EXPRESSLY DECLARES.

It reads, "And all juries to serve in courts after "the passage of this act SHALL BE DRAWN IN CONFORMITY HEREWITH."

See Act of June 30, 1879, 21 Statutes-at-Large, page 43.

This was also the opinion of District Judge Addison Brown, who, in his opinion, stated:

"I have no doubt that the requirements of "the act of 1879 are mandatory and that any "substantial departure from its provisions "will invalidate the subsequent proceedings "if due objection is seasonably raised."

See Opinion Brown, J., Record, page 56.

These views are in direct accord with the decisions of the Federal and State Courts.

Neal *v.* Delaware, 103 U. S., 307.
U. S. *v.* Hammond, 2 Woods Circuit Court Reports, 197.
McQuillen *v.* the State, 16 Miss., 587.
Clare *v.* the State, 30 Md., 164.
State *v.* Symonds, 36 Maine, 128.
Brown *v.* Commonwealth, 73 Penn., 321.
Scott *v.* the State, 63 Ala., 59.
Berry *v.* the State, 63 Ala., 126.
Finley *v.* the State, 61 Ala., 201.
Avirett *v.* the State, 76 Md., 510.

Hamlin *v.* Fletcher, 64 Georgia, 519.
State *v.* Newhouse, 29 La. Ann., 824.
State *v.* Akum Griffice, 74 N. C., 316.
State *v.* Rockafellow, 6 N. J. Law, 405.
Brazier *v.* The State, 44 Ala., 387.
People *v.* Thurston, 5 Cal., 69.
Reich *v.* The State, 53 Georgia, 73.

In all of these cases there was no question of actual fraud or wrongful intent on the part of any of the persons connected with the empanelling and drawing of the grand juries, but simply a departure from the statutory mode regulating such procedure.

The grounds for the decisions were that a grand jury does not, by the laws in force in this country, consist of a body of men congregated by the mere order of the Court, or by accident in a jury box, but of the requisite number of competent individuals selected, summoned and sworn according to the forms of law; and that if the law be not followed the body empanelled is an incompetent grand jury without authority to find an indictment against any one; that when a statute lays down in unambiguous terms the mode in which a jury shall be drawn, its provisions are mandatory and may not be departed from in any substantial particular.

In NEAL *v.* DELAWARE (*supra*) the question came before this Court as to the effect of a disregard of the constitutional provisions guaranteeing to every person the equal protection of the laws. The defendant was a man of color, and the grand jurors who returned the indictment, and the petit jurors who were summoned to try the case, were of the white race exclusively. It appearing that all citizens of the African race had been excluded from the list of grand and petit jurors because of their race and color, it was held by this Court that the

judgment of conviction should be reversed, as well as the order denying the motion to quash the indictment and panels of jurors.

Neal *v.* Delaware (*supra*).

In UNITED STATES *v.* HAMMOND (*supra*) the indictment was for the same offense as the one with which these appellants are charged, namely, conspiracy to defraud the United States under Section 5440 of the Revised Statutes. It was claimed that two of the grand jurors by whom the indictment was found were disqualified to act as such, because without duress or coercion they had taken up arms and joined the rebellion against the United States and given it aid and comfort.

The plea was based on Section 820 of the Revised Statutes, which declares that taking up arms as charged should be cause of disqualification and challenge of grand and petit jurors in the courts of the United States.

It was held that this was an absolute disqualification imposed by the statute, and that such a disqualification of even a single grand juror vitiated the indictment.

United States *v.* Hammond (*supra*).

In MCQUILLEN *v.* THE STATE (*supra*) the indictment was for an assault committed with intent to rob. The defendant moved to quash the indictment, on the ground, among others, that the writ of *venire facias* was defective, and that the jurors were not drawn in the presence of the Judge of Probate of the County of Washington, and also were not drawn from the jury book or list, as the statute directed.

In reversing a judgment of guilty, and remanding the case for a new trial, Chief Justice Sharkey,

speaking of the statutory provisions, said: "These "restrictions and requisites have been imposed for "wise purposes. They are safeguards thrown "around the liberty of the citizens. They consti- "tute an important part of the right of trial by "jury."

McQuillen *v.* State (*supra*).

In CLARE *v.* THE STATE (*supra*) the indictment was for murder, and the prisoner pleaded in abatement that the Grand Jury had beea illegally drawn.

1st. That the indictment was not found by the grand inquest of Baltimore City.

2d. That by the Code of Public Laws of the State of Maryland it is provided that the Judge of the Superior Court and others therein named shall meet at such place as they may appoint during the month of March, in each and every year, to select the names of seven hundred and fifty persons to serve on the grand and petit juries of the city. That they did not, in the month of March, 1866, or at any other time, select the said number of persons qualified to serve as grand jurors at the May term, 1866, of the Criminal Court of Baltimore, being the term at which the indictment was found, and that there had never been any such appointment of jurors qualified under the laws of the State to serve as grand jurors for said Court at said term.

3d That by the 608th Section of the said Article, it was the duty of the Judge of the Superior Court to cause the names of the several panels to be drawn in the mode prescribed to be entered in five several books, and that the books shall be certified by the said judges and denominated the jury book, Balti-

more, one of which shall be deposited with the Sheriff, who shall summon 23 of the said persons to serve as grand jurors; that the Judge did not prepare the names nor certify the jury books, as required, before the commencement of the term at which the indictment was found.

4th. That the indictment was found by persons assuming to act as grand jurors, who were not qualified to act as such, in that their names had not been selected by the Judges, and were not entered in the order in which they were drawn, and in that the copy of the jury book required to be deposited with the Sheriff was not certified by the Judges as required by law in that they did not assemble ten days before the commencement of the May term.

5th. That four of the grand jurors were not duly and legally qualified to act as such, in that they had served within the period of two years from the time they assumed to act as such.

These various pleas were overruled and the prisoner pleaded not guilty. The trial proceeded and a verdict of guilty of murder in the first degree was rendered.

After reviewing the statutory requirements and holding that they were designed to avoid if possible, vices then existing in regard to the organization of juries for the City of Baltimore, and to accomplish a reform in that respect, the Court, speaking by Stuart, J., said:

> "The grave and responsible duties required "of the judges were, in fact, *attempted to be* "*discharged by one of the deputy clerks.* "The law never contemplated that juries to "determine life, liberty, reputation and "property should be thus selected, when it "had specially and emphatically devolved "the duty upon the judges. Not only was "there no meeting for consultation on the

" part of the judges for the selection of
" names of persons to compose the list, but
" no meeting afterwards to approve or reject
" what had been done by the subordinate
" official. When presented to each Judge
" separately, it was adopted without particu-
" lar examination. We cannot give our
" sanction to such a mistaken execution of
" this law; its chief provisions have been dis-
" regarded--indeed, virtually abrogated. It
" follows, from these fatal omissions, that
" the body of men assuming to act as a grand
" jury, and to find the indictment in this
" case, were not qualified to act as such, be-
" cause the mandates of the law had not been
" pursued in their selection. When these
" facts, complained of by the pleas of the
" prisoner and denied by the State, were
" found by the Court below, that Court
" should not have decided that they were
" mere informalities, but fatal defects, and
" quashed the indictment and caused the
" prisoner to be indicted *de novo*."

Clare *v.* The State (*supra*).

In BROWN *v.* COMMONWEALTH (*supra*) the defendant had been indicted for murder, and he challenged the array of jurors for the reason that the Sheriff and Jury Commissioners of Schuylkill County, at the time of the selecting and placing in the wheel of the names of the jurors, did not secure it in the manner required by law, the wheel being sealed with only one seal, whereas the statute required that it should be secured by sealing the same with their respective seals.

The Court held that the challenge was good and that the indictment should have been quashed.

Brown *v.* Commonwealth (*supra*).

In AVIRETT *v.* THE STATE (*supra*) the indictment was for libel, and among the pleas filed by the defendant was one presenting the question of the regularity of the drawing of the grand jury finding the indictment.

The Code of the State of Maryland provided that it should be the duty of the Circuit Courts for each of the counties in the presence of such practicing members of the bar as should think proper to attend, to proceed to select from the jury list last furnished by the Clerks of the County Commissioners and from the poll books of the several election districts, a panel consisting of the names of two hundred persons to be fairly and impartially selected by the Judge, with special reference to their intelligence, sobriety and integrity and without the least reference to their political opinions.

It was pleaded in abatement that the jurors drawn for the term at which the defendant was indicted, were not drawn as the statute required.

In support of this plea it appeared that the Judge drew the grand jury from a list previously made out by him from the names of persons that he knew, and from names that had been suggested to him by different persons in the different districts of the county, but was chiefly composed of the names of persons that had previously been in the books but had not been drawn out, and that some of the names had been suggested by different members of the bar; that no reference was made at that time to the poll-books or to the list mentioned by the Clerk of the County Commissioners, except to ascertain the correct spelling of one of the names and whether another person on the list was twenty-five years of age.

All of the names placed in the box appeared upon the poll-books of the several election districts of Alleghany County, but some of them did not ap-

pear upon the list of taxpayers filed by the Clerk of the County Commissioners.

The Court holding that the method of selecting the jury was not a substantial compliance with the provisions of the statute, speaking by Coleridge, J., observed that all questions touching the formation of juries must be examined by the Judge with very critical eyes, and expressed himself as follows:

> "This Court has said, in Green *v.* State, "59 Maryland, 123, that 'the general method "'prescribed for drawing jurors is manda- "'tory, and substantial compliance with "'the provisions thereof in respect to the "'selection and drawing of jurors is neces- "'sary to make the jury a legal one; and "'unless the selections are made by the "'Judge in the manner pointed out by the "'statute, exception at the proper time and "'in the proper way may be successfully "'taken to a jury improperly chosen and "'drawn; otherwise the statutory pro- "'visions would be wholly nugatory.' "Now, the statute unequivocally prescribes "that the two hundred names which are to "be placed in the box and from which the "names of the forty-eight persons who are "to form the grand and petit jurors are to "be drawn, shall, in the presence of such "members of the Bar as think fit to attend, "be selected by the Judge from the tax list "and the poll books. The persons who "shall make the selection is the Judge and "no one else; the selection is to be made "publicly in the presence of the members of "the Bar, if they attend after notice; and the "poll books and tax lists are the two ex- "clusive sources from which the Judge can "procure the names to be placed in the jury "box. The selection must be made by him

" with special reference to the intelligence,
" sobriety and integrity of the persons
" chosen. * * * It was the obvious design of
" the law to provide the most minute safe
" course for the selection of intelligent, dis-
" interested and upright jurors; but this
" salutary policy might be utterly frustrated
" if the Judge, instead of himself making
" the selections, merely adopted the lists
" privately furnished to him by persons who,
" without his knowledge, may be interested
" in securing the attendance of particular
" individuals to serve upon the jury. The
" names thus furnished by him may be
" names upon the poll books or tax list, but
" they are not names selected by him there-
" from. If he placed into the jury box
" the names thus given him, he accepts
" the selection of some one else. * * *
" Confessedly, the names were not
" taken from the tax list or the poll book,
" for these were referred to but twice, once
" to verify the spelling of a name and once to
" ascertain a person's age. That the names
" actually selected happened to be upon the
" poll books or the tax list was an accident.
" They were not taken from either; and if
" they were not taken from either at the
" time and in a manner designated by the
" law, the plain letter as well as the manifest
" design of the statute was clearly dis-
" regarded. If the practice pursued in this
" case were tolerated, it is not difficult to
" foretell its wide-spread and disastrous con-
" sequences; designing or interested parties
" or others at short notice might with ease
" impose upon a Judge by privately suggest-
" ing the names of persons unfit to be jurors;
" but what is still more to be dreaded, they

" might by the same means secure for their
" own sinister ends an absolute dominion and
" control over the jury. It would be a last-
" ing reproach to the administration of
" justice if the Court sanctioned any con-
" struction of this statute which would af-
" ford the slightest opportunity for the cun-
" ning, the crafty and the unscrupulous to
" secure the selection of a venal, a corrupt
" or pliable jury. And yet such a result is
" precisely the one that will come to pass—
" perhaps not immediately, but none the
" less inevitably unless the practice followed
" in this case is absolutely abandoned and
" discountenanced at once. If the selection
" of names be made privately when the law
" declares that they shall be made publicly;
" if they are made before the day designated
" for them to be made when the law requires
" them to be made on that day; and if they
" be made from sources not mentioned by
" the statute instead of from the two sub-
" stantially prescribed thereby; and a jury
" thus selected and drawn be held to be a
" legally constituted panel, then the most
" material provisions of the jury law will be
" swept away by sheer judicial legislation."

Airrett v. State (*supra*).

In STATE *v.* NEWHOUSE (*supra*), also an indictment for murder, one of the grounds for appeal was the alleged illegal organization of the grand jury.

The statute respecting the formation of grand juries provided that two jury commissioners were to select impartially from the citizens of the parish of Orleans, having the qualifications requisite to register as voters, the names of not less than five

hundred good and competent men, a list of whose names should be made out and returned, certified under their hands, to the Clerk of the Superior Criminal Court; each of the names on the list were to be written out by the Clerk, on a separate slip of paper, together with the place of residence of each person, and the slips of paper were to be placed in a box or wheel to be kept for that purpose by the Sheriff of the court. Ten days before the expiration of either month in which the court should hold its sessions, the two commissioners, together with the Sheriff, should proceed to draw from the box not less than forty eight names, and the persons whose names were so drawn were to constitute the petit jury for the month or session of the court succeeding such drawing. Before proceeding to trial, the accused challenged the array of petit jurors, and moved to quash the venire on various grounds, among which were:

1st. That the names from which the venire was drawn, and out of which the petit jury was composed, were not selected by the jury commissioners, but that a list of over two hundred names was furnished by one Adams to said commissioners and put into the wheel from which the venire was drawn.

2d. That in the said wheel at the time the jury were drawn, there were names of persons selected by James Lewis and Smallwood, as jury commissioners, at a time when said Lewis was not a jury commissioner, he having months before resigned his office and accepted that of police commissioner. The Court holding these objections to be good, said:

> " Both of these objections were, we think,
> " clearly shown to be true, in point of fact.
> " It seems that the commissioners, to lighten
> " their labors, asked Adams to furnish them

"a list of two or three hundred names for "the jury wheel, which he did. The com- "missioners, in their testimony, state that "they looked over and approved this list af- "ter Adams prepared it. The District Judge "was of opinion that this was a substantial "compliance with the statute, and that the "commissioners, by approving, made the "list their own selection. We do not think "so. To so hold would be equivalent to "affirming that the commissioners could "act by proxy or deputy in the per- "formance of their very important and "grave duties. Nothing in the statute justi- "fies such an inference. Much less could "their functions be performed by a person "like Mr. Adams, who was, as it were, a mere "bystander, under none of the obligations of "an official or even of an agent or proxy. It is "manifest that there would and could be no "security for the accused against packed "juries, if they be selected in this loose way. "The intent of the law was that two respect- "able and competent men should, under the "appointment of the Governor and under the "sanction of oath, select from all the voters "of the parish a list of persons to serve as "jurors; they should inspect and select from "the names of all the voters and not simply "inspect and approve what might be a cut "and dried list of two or three hundred "names. Such a system is too liable to "abuse to be tolerated by courts charged "with the rights and liberties of citizens."

State *v.* Newhouse, 29 La. Ann., 824.

These cases from which we have quoted, as well as the others referred to by us under this subdivis-

ion, we submit, are direct authority for holding that the indictment found in the Southern District of Georgia against these appellants was not found by a legally constituted grand jury, but by a body of men congregated in total disregard of the statutory provisions and invested with no authority to find indictments against persons accused of crime; that a finding by such a body is not the presentment or indictment provided for by the Fifth Article of Amendment to the Constitution of the United States; and that the removal of these appellants for trial upon such a finding would be without that due process of law guaranteed to every individual by the Constitution.

Sixth.—THE ALLEGED INDICTMENT IS ALSO INVALID BECAUSE IT PURPORTS ON ITS FACE TO HAVE BEEN DRAWN IN THE EASTERN DIVISION, WHEREAS, AS A MATTER OF FACT, IT WAS DRAWN AT THE CITY OF MACON IN THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

The statute creating the Eastern Division of the Southern District of Georgia provides:

> "Prosecutions for crimes or offenses here-
> "after committed in either of the subdivi-
> "sions shall be cognizable within such divi-
> "sion."

Judge Krekel, in U. S. *v.* BERRY, 24 F. R., 780, held that this language (or practically the same) requires all proceedings to punish for a crime committed in a division of a district to be had and conducted within the division where the offense is committed.

This decision is cited with approval by Judge Hanford in U. S. *v.* WAN LEE, 44 FED REP., 707.

The face of the indictment in this proceeding shows that it was drawn "FOR THE EASTERN DIVISION OF THE SOUTHERN DISTRICT." This is held to

make the indictment void, as no matter where the jury is drawn, IT MUST BE FOR THE WHOLE DISTRICT AND NOT FOR THE DIVISION.

U. S. *v.* Dixon, 44 Fed Rep., 401.

While this case was not followed, but directly disapproved by Judge Hanford in the Wan Lee case (44 Fed. Rep., 707), so as to make the question yet unsettled, or rather to be determined by this Court, there is no authority against the decision of U. S. *v* BERRY (24 F. R., 780), approved by U. S. *v.* WAN LEE (44 F. R., 707), that all the proceedings must be in the division where the offense was committed.

What does the caption of this indictment show, and what is the uncontradicted proof, as to where the jury was drawn?

THE INDICTMENT.—"THE GRAND JURORS OF THE "UNITED STATES CHOSEN, SELECTED * * * IN "AND FOR THE EASTERN DIVISION," ETC

THE EVIDENCE.—ON THE 22D OF NOVEMBER, 1899, AT THE CITY OF MACON, IN THE WESTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA, JUDGE SPEER, ASSISTED BY THE UNITED STATES MARSHAL, DREW THE NAMES OF THE JURY FROM THE BOX BELONGING TO THE EASTERN DIVISION.

See testimony of Barnes, Record, p. 61, fol. 113.
See testimony, L. M. Erwin, Record, p. 72, fol. 133.
See Exhibits, Record p. 14, fol. 27.

Clearly this testimony shows that this Grand Jury was not drawn IN THE EASTERN DIVISION OF THE SOUTHERN DISTRICT OF GEORGIA.

There is nothing then before the District Court of Georgia which these appellants can be held to

answer, and their further detention is without authority of law and in violation of their constitutional right to be secure in their persons against unreasonable searches and seizures.

Point III.

The defendants have in no way waived their right to insist that before they shall be held to answer an infamous crime they must first have been indicted by a grand jury empaneled and sworn according to law.

This Court has never held, nor do we believe it ever will hold, that the objection that the mandatory provisions of the statute which perform a vital function in the empaneling of a grand jury have been disregarded or substantially departed from, can be waived.

On the contrary, it has ever been alert to assert the importance of an indictment by a legally drawn grand jury, in the trial of crimes and offenses involving life or infamous punishment. It is true this Court has said that where the objection relates to a mere irregularity which does not make the whole panel void or is not shown to have prejudiced the accused, it must be raised at the first opportunity or be deemed waived.

In UNITED STATES *v.* GALE (109 U. S., 65) objection was taken to the grand jury on the ground that four persons otherwise competent should have been excluded from the panel on the ground that they had voluntarily taken part in the rebellion and had given aid and comfort thereto, and that such acts

had disqualified them as grand jurors under Section 820 of the Revised Statutes.

The objection was not taken until after the defendant had pleaded to the indictment *and had been tried and found guilty.*

This Court held that the objection came too late; that the defendants should have either moved to quash the indictment or have pleaded in abatement if they had had no opportunity or did not see fit to challenge the array.

The opinion of the Court was written by Mr. Justice Bradley and he expressly stated that there were cases in which the objection to the grand jury might be taken at any time, as where THE WHOLE PROCEEDING OF FORMING THE PANEL IS VOID, as, for instance, where the jury was not a jury of the Court or term in which the indictment was found, or had been selected by persons having no authority whatever to select them, or where they had not been sworn or where some other fundamental requisite had not been complied with.

U. S. *v.* Gale (*supra*).

In AGNEW *v.* UNITED STATES (165 U. S., 36) it was set up as ground for abatement of the indictment that *after the original venire had been exhausted*, purporting to act under the provisions of Section 808, sixteen grand jurors were obtained in the following way:

The Court ordered a special venire to issue for ten grand jurors to be drawn according to law "to be taken from the County of Duval."

In drawing the ten grand jurors, the Clerk and the Marshal, if a name drawn from the box was of a person not from the County of Duval, laid it aside and continued drawing until ten names from the County of Duval were obtained.

The Court, on excusing three of the ten so drawn,

ordered four more names to be drawn to complete the panel and the same procedure was adopted in regard to these four, and the procedure continued until the Grand Jury was completed with persons from Duval County.

There was no question in that case as to the jury box having been legally made up, and, as said by Chief Justice Fuller, in his opinion, the jurors were all drawn from the body of the district as provided by Section 808.

It was held that this was at most an irregularity which did not relate to the competency of the individual jurors; that in such cases the defendant must take the first opportunity in his power to make objection, and if he lies by until after his case was to be brought before the Grand Jury, his exception may be too late, but if he has had no opportunity of objecting before bill found, then he might take advantage by motion to quash or by plea in abatement.

Agnew *v.* U. S. (*supra*).

Neither of these cases, we submit, bears upon the question in the case at bar.

HERE THE ILLEGALITY IS SUCH AS TO RENDER THE WHOLE PANEL VOID. It is not a mere irregularity, but goes to the competency of the Grand Jury finding the indictment.

This case is, we submit, directly in that class of cases where the objection may be taken at any time because the whole panel is void, and all proceedings by that body are *coram non judice*.

Neal *v.* Delaware, 103 U. S., 370.
U. S. *v.* Hammond, 2 Woods' Circuit Reports, 197.

Clare v. The State, 30 Md., 164.
Finley *v.* The State, 61 Ala., 201.
State *v.* Rockafellow, 6 N. J. Law, 405.
State *v.* Akum Griffice, 74 N. C., 316.
People *v.* Thurston, 5 Cal., 69.
Reich *v.* The State, 53 Ga., 73.

In CLARE V. THE STATE (*supra*) upon the question of waiver, the Court said:

"No grand jury could be lawfully assembled in the city of Baltimore except by virtue of this jury law. If its essential requirements have been disregarded in reference to the selection and summoning of the grand jury in question, that body had no authority to act as such, and any indictment found by them was void, and must be so regarded by the courts as if expressly so declared by statute. The legal result is the same. No body of men assembled without authority of law have the right to assemble to act as a grand jury. The current of authority in this country sustains this view. Although there are some decisions of respectable courts and *dicta* of eminent judges to the effect that the objection in question must be taken by challenge to the array or to the polls, yet the decided weight of authority in this country is that the objection, whether to individual jurors or to the constitution of the whole body, may be taken by plea in abatement or motion to quash after bill found and before plea to the merits. This position is also sustained by sound reason. To confine the right of objection to the qualification of the grand jury to challenge to the array would in practice render it utterly worthless. In many, perhaps in a majority of cases in

" our criminal practice the first notice that a
" party has of an accusation against him,
" is a bench warrant or capias issued
" upon a presentment or indictmant. Where
" parties are under arrest they are
" not brought into court when the grand
" jury are empanelled and sworn, and often
" have not the opportunity to make the
" challenge, either to the body or individual
" members. No list of those who are to
" compose the grand inquest is ever fur-
" nished them, and most generally they have
" no means of knowledge upon the subject.
" To a party thus situated it would be but a
" mockery of law and justice to compel him
" to such defense before indictment found
" or to be considered as forever waiving the
" objection to the competency of the body
" alone authorized to take the initial step
" towards his lawful conviction. It is indis-
" pensable in a criminal trial that the grand
" inquest required to find the indictment
" should be constituted of 'good and lawful
" men,' and if the body, or any part of it,
" lie under substantial disqualification, they
" may be challenged by the prisoner before
" the bill is presented, or after the finding,
" the prisoner may plead the objection in
" abatement thereof. We fully concur in
" the remarks of Judge Hitchcock, in his
" dissenting decision in Boyngton *v.* State,
" 2 Porter, 143, which was subsequently
" followed in the Alabama decisions over-
" ruling the opinion of the majority in that
" case. 'What principle of public policy
" can be more sacred than that the sources
" of justice should be pure and wherein is the
" inconvenience greater after bill found than
" before? A bill is found to-day, the de-

"fendant put on trial to-morrow. He can "allege nothing against the Grand Jury when "the next entry on the minutes may be an "order discharging the same jury at the "suggestion of any idle by-stander against "whom no charge is made. Ought not the "Court rather to say that indictments found "by persons not good and lawful men shall "be revoked, annulled and holden for none "forever. If I am to be put on trial for my "life, let my accuser at least be *boni et* "*legales homines.* * * * Under any gov- "ernment of law the trial of persons accused "of crime from its commencement to the "conclusion should be scrupulously con- "ducted according to the requirements of "the law. Not only the sacred administra- "tion of public and private justice, but the "good order of the community, the security "and protection of life, liberty and property "cannot be preserved, except by the inflexi- "ble maintenance and impartial enforce "ment of the statutory as well as the fun- "damental laws of the land. Where the "substantial provisions of the law have not "been regarded, and a party has been con- "victed in violation thereof, and without "their sanction, such party is entitled to "a reversal, if legal steps in due time are "taken to obtain redress."

Clarke *v.* State, 30 Md., 164.

And in FINLEY *v.* THE STATE (*supra*) the same view was expressed.

The Court said:

"An accusation of a criminal offense, not "the finding and presentment of Grand "Jury, is not an indictment and confers on a

"court no jurisdiction to put the accused on "a trial before a petit jury. A verdict and "judgment pronounced on such an accusa- "tion are absolutely void. The Circuit Court "is a court of superior jurisdiction, and it "may be, if its records are silent, or there "are recitals as to the organization of "a grand jury, that the presumption of reg- "ularity and legality will be indulged in to "support its judgments. But if its records "affirmatively disclose that a body of men "has been organized as a grand jury in vio- "lation of the statutes which prescribe the "mode of organizing such a jury, clothed "with the power of making presentments "which operate as criminal accusations "against the citizen, all the acts of that "body must be pronounced void; no solicita- "tion or laches on the part of the accused "can cure the illegality."

Finley *v.* State, 61 Ala., 201.

And in STATE *v.* ROCKAFELLOW (*supra*), upon the question of waiver, it was said:

"To contend that the accused person must "challenge the Grand Jury, when he is "called in court to be sworn, would be just "as much an innovation upon the act of "assembly. No mode is pointed out in "which the exception is to be taken, and we "consider that as the most correct mode "which, without being otherwise peculiarly "repugnant to the principles or policy of "the law, is ever calculated to give effect to "its human and salutary provisions. If the "mode by challenge is to be adopted it must "necessarily result that nine times out of "ten the benefit of a statute which provides

" a security for our lives, fortunes and repu-
" tation, by requiring that an indictment
" shall always be presented by jurors re-
" spectable for their character and stand-
" ing in society, shall be absolutely lost
" to the accused, without any actual
" neglect or fault of his own. It fre-
" quently occurs that the accused is altogether
" ignorant of the complaint when the Grand
" Jury is called; if he should chance to be
" present he cannot be assured that the
" prosecution will proceed; and at any rate
" it would be most extraordinary for him to
" make his challenges when there is no cer-
" tainty that his case will come under their
" cognizance. In most cases of a capital
" nature the person charged with the offense
" is actually in confinement and has not the
" physical capacity to make his challenges;
" he is never brought out and confronted
" with the Grand Jurors; nor is he served
" with a list of the persons who are to com-
" pose it; thus circumstanced it would be
" worse than a form; it would be a mockery
" of law and justice to compel him to avail
" himself of exceptions of this kind or to be
" considered as forever waiving every error
" in the proceedings of the Sheriff. It is
" surely the proper time and certainly early
" enough for the accused to except to the
" qualifications of the indictors after the bill
" had been presented against him. He then
" knows or can be informed who they are;
" he has time to ascertain their qualifications
" and his own means of proving the excep-
" tions which he may be advised to take; and
" we are unable to perceive any grounds

> " upon which he can be fairly deprived of
> " his plea to their incompetency."
>
> State *v.* Rockafellow, 6 N. J. Law, 405.

And in People *v.* Thurston (*supra*) the Court observed :

> " It is said that this objection comes too
> " late and ought to have been taken advant-
> " age of before the trial. It does not appear
> " upon the face of the indictment and it is
> " doubtful if it were known to the prisoner;
> " even if such was the fact I regard the in-
> " dictment thus found by an illegally con-
> " stituted body as worthless and all proceed-
> " ings based upon it void."
>
> People *v.* Thurston, 5 Cal., 69.

The views expressed in these cases are directly applicable to the case at bar. The body finding the alleged indictment was not a legal Grand Jury. It had no authority whatsoever to find any indictment. Its proceedings were *coram non judice*, and void.

But even if the proceedings were not void, the petition shows that these appellants have raised the objection at the first opportunity.

They were not in the State of Georgia when the alleged indictment was found, nor were they informed that any indictment against them was contemplated.

The first notification they had was the issuing of a warrant for their arrest in the Southern District of New York, to be held to await a warrant of removal.

It was in the removal proceedings that objection was taken by them to the illegality in the formation of the Grand Jury.

Nor can the trick resorted to by the United States Attorney in notifying their attorney in the removal proceedings to produce them for the purpose of pleading to the indictment and of raising any objections they might have to the Grand Jury be successful.

If these appellants had allowed themselves to be inveigled into the State of Georgia, it can be affirmed with the utmost confidence, that they would immediately have been arrested, and held within that jurisdiction.

But because they did not see fit to thus surrender themselves, the District Attorney caused his notice to be spread upon the records of the District Court by order of District Judge Speer. That notice is, we believe, to be urged, if these appellants are removed to the State of Georgia for trial, as ground for holding that they have waived their right to object to the illegality of the finding of the indictment.

Such a contention is utterly without merit. The proceedings for removal were commenced prior to these appellants being called upon to plead. It was in such proceedings that objection was made to the Grand Jury. Then the first opportunity was presented to the appellants to question the legality of the body finding the indictment, and they promptly availed themselves of it.

We respectfully submit that the facts and circumstances in the case at bar prevent the finding of waiver by the appellants even if they could waive the defects alleged.

Then, too, even if it were necessary to show prejudice from the illegal manner in which the grand jury was drawn, such fact, we submit, sufficiently appears from the record.

In the letter written by District Attorney Erwin to Judge Speer he calls attention to the fact that

the "grand jury will be needed to pass upon cer-
" tain cases, the most important of which involve
" matters touching frauds alleged to have been
" committed in river and harbor improvements
" carried on by the Government *in and about the*
" *cities of Savannah and Brunswick*, and which re-
" ceived much discussion and publicity AMONG THE
" PEOPLE IN THE COUNTIES IN WHICH THESE CITIES
" ARE SITUATED."

See Letter, Record, p. 96, fol. 179.

What was the motive of the District-Attorney in seeking to exclude jurors from Chatham and Glynn counties? Did he, as prosecuting officer, seek to exclude grand jurors likely to return an indictment, or those not likely to do so? Is it not a fair inference from his action that in his opinion the citizens of Savannah and Brunswick, knowing of the benefits to their cities which had been derived from the improvement of Savannah Harbor and Cumberland Sound, and of the manner in which the work had been done, were favorable to these appellants, and would be more likely to refuse than to find an indictment against them?

If a prosecuting attorney can secure an indictment by the disqualification and exclusion of more than half the number of names in the jury box on account of their supposed favorable attitude to the accused, can he not by the exclusion of three-fourths or nine tenths, or in fact, by confining the panel to a picked few, upon whom he can rely, secure the finding of any indictment which he may place before them?

Of course, these may be extreme views, but if the practice resorted to be overlooked it might lead to the most gross abuses, and abrogate entirely the safeguards of personal liberty, to protect and pre-

serve which the statutory enactments were designed.

We insist that the defects complained of were not irregularities but illegalities affecting the whole panel; but even if they be considered mere irregularities, the record in this proceeding shows prejudice to these appellants by the course adopted.

Point IV.

The question of the legality of the Grand Jury should be decided by this Court in this proceeding, and not left to be decided by the District Court of Georgia upon the trial.

Judge Brown, in the removal proceedings, seems to have been impressed with the strength of the appellants' contention respecting the illegality of the grand jury, but he refused to decide the question for two reasons.

1st. "Because the question is a new one arising "upon the construction and effect of an important "statute and not decided or in any way passed "upon by the Supreme Court as the ultimate au- "thority. Any decision in defendants' favor in "this proceeding cannot be reviewed or corrected "if erroneous, in the ordinary mode of review; and "justice would, by such an erroneous ruling, be "defeated; whereas by leaving the question for the "Trial Court this objection will continue to be "equally available to the defendants there, and any "decision thereon, adverse to the defendant, if er- "roneous, can be corrected in the regular course of "appeal. It is only where there can be no reason-

" able doubt concerning the invalidity alleged that " removal should on such grounds be refused."

2d. Because there was, at least, some question whether the objection to the grand jury had not been waived.

See Opinion Brown, J , Record, pages 56–7.

The second objection stated by the learned Judge, we have already, we submit, sufficiently answered.

As to the first objection we need only say that it can have no force in this proceeding.

All of the evidence available has been produced, and is a part of the record now before the Court.

There is no dispute whatsoever in the facts.

We fail to see why the Judge presiding at the trial in the District Court of Georgia is more competent to decide the question presented than the Judge of the District Court directing the removal, or the Judge of the Circuit Court denying the application in this proceeding.

In the MATTER OF TERRELL (51 Fed. Rep., 213), Judge Lacombe expressed the view that if questions are presented of such a character that the opinion of an appellate court should be obtained, a proceeding by habeas corpus is the appropriate way in which to raise them " for a decision here adverse " to the Government is reviewable by appeal; but a " similar decision on the trial is final, as the Govern- " ment cannot appeal from a criminal judgment."

In re Terrell, 51 Fed. Rep., 213.

But, in any event, the question is now properly before this Court as the ultimate authority and should be decided.

Pullman Palace Car Co. *v.* Central Transportation Co., 171 U. S., 138.

Moreover, the gravity of the questions presented and the importance of a decision by this Court to the appellants cannot be over estimated.

It is entirely unnecessary to call attention to the functions of a Grand Jury and its value in the cause of personal liberty.

To quote Mr. Justice Field, its institution in this country "is designed as a means of not only bring-"ing to trial persons accused of offenses on just "grounds, BUT ALSO AS A MEANS OF PROTECTING "THE CITIZENS AGAINST UNFOUNDED ACCUSATION "WHETHER IT COMES FROM OR BE PROMPTED BY PAR-"TISAN PASSION OR PRIVATE ENMITY."

And he quotes with approval the words of a distinguished Judge to the effect that "into every "country of the globe in which the Anglo-Saxon "race have formed settlements they have carried "with them this time-honored institution, ever re-"garding it with the deepest veneration and con-"necting its perpetuity with that of civil liberty."

Mr. Justice Field in 2 Sawyer, 228–229.

Mr. Justice Wilson, formerly of this Court, gave expression to the view that "Among all the plans "and establishments which have been devised for "securing the wise and uniform execution of the "criminal laws, the institution of grand juries "holds the most distinguished place. This institu-"tion is at least in the present times the peculiar "boast of the common law. * * * In the annals "of the world there is not found another institu-"tion so well adapted for avoiding all the incon-"veniences and abuses which would otherwise "arise from malice, from rigor, from negligence, "or from partiality in the prosecution of crimes" (3 Wilson's Works, pages 363–364).

The liberties of citizens, says Blackstone, "cannot

"but subsist so long as this palladium remains "sacred and inviolate."

For a most impressive argument upon the value of an indictment by a grand jury to the liberty of the citizen we refer to the opinion of Mr. Justice Harlan in the case of HURTADO *v.* CALIFORNIA (110 U. S., 225), from which the extracts above quoted have been taken.

Nothing further than was there said need be or can be advanced to show the importance and value of a valid indictment found by a jury empanelled according to the forms of law. Of this valuable right it is sought to deprive these appellants.

The United States Attorney for the Southern District of Georgia has already attempted to lay a foundation for claiming a waiver by them of the questions here presented, by formulating and sending to their attorney in the removal proceedings, a notice requiring their appearance to plead to the indictment in the Southern District of Georgia, while the proceedings for their removal were pending in the Southern District of New York.

See Letter, Record, page 156.

This letter, together with the answer sent by Mr. Rose, was by order of Judge Speer directed to be placed on file as a part of the record of the proceedings in that case.

See Order, page 155, folio 279.

It is not necessary to impugn the action of either the District Judge or the District Attorney. Such a proceeding, however, we believe to be without precedent and entirely unjustifiable, and at least shows a disposition on the part of the District Attorney to evade meeting the questions here pre-

sented on the merits by claiming a waiver of them by the appellants.

If his contention on the question of waiver be upheld, then these appellants will be put to the hazard and expense of a trial before a court in a foreign state upon an invalid indictment without the question of the legality of the finding of the indictment having been passed upon by this Court as the ultimate authority.

BESIDES THE DISTRICT JUDGE WILL BE COMPELLED TO PASS UPON THE VALIDITY OF HIS OWN ACTS, WHICH FORM A MATERIAL PART OF THE ILLEGALITIES IN THE FORMATION AND DRAWING OF THE GRAND JURY.

If such a proceeding be authorized then the constitutional guarantees against being deprived of their liberty without due process of law, and to be protected in their persons against unreasonable seizures would be of little avail to these appellants.

The books are full of cases where the prisoner has been discharged upon habeas corpus BEFORE TRIAL, where it is made to appear that he cannot lawfully be tried for the offense with which he is charged.

Thomas *v.* Loney, 134 U. S., 372.
Cunningham *v.* Naegle, 135 U. S., 1.
Boske *v.* Comingore, 177 U. S., 459.
People *v.* Brady, 56 N. Y., 182.
In re Greene, 52 Fed. Rep., 104.

And in proceedings for removal, under Section 1014, this Court expressly held that it is the duty of the Court, upon habeas corpus, not only to inquire into the question of jurisdiction, but also into the sufficiency of the indictment.

Horner *v.* U. S., 143 U. S., 207.

See also

In re Greene, 52 Fed. Rep., 104.

Where the prisoner is held under State authority a different rule prevails, and in the absence of special circumstances, the Federal courts it seems will not interfere until after trial in the State courts.

Ex parte Royall, 117 U. S., 241.

Here there is no question of State authority, but one solely of Federal jurisdiction.

Every consideration requires a decision of the questions presented by this Court in this proceeding.

In no other way can these appellants receive the summary relief directed by the Habeas Corpus Act, requiring that a person deprived of his liberty, in contravention of the Constitution or laws of the United States, shall "FORTHWITH" be discharged and set at liberty (Act of February 5, 1867; 14 Stat., 385).

Point V.

The constitutional rights of the appellants have also been violated, because the warrant of removal was issued without a finding of probable cause by the officer whose duty it was to find the same.

First.—The Constitution expressly provides that no warrant shall issue but upon probable cause.

See Constitution, Article 4.

In the case at bar on the first hearing before Commissioner Shields the Government offered in evidence as proof of probable cause simply the indictment found by the alleged grand jury in the Southern District of Georgia.

The only other proof offered was as to the identity of these appellants with the persons charged in the indictment.

All testimony offered by them tending to show that there was no probable cause was rejected.

A finding of probable cause was made by the Commissioner, and a motion was made for the issuance of a warrant of removal.

This motion came on for a hearing before District Judge Addison Brown, who reviewed the various decisions on the question of removal, and the procedure applicable thereto, and held that under the decision *In re* DANA (68 Fed. Rep., 886), these appellants were entitled to introduce evidence tending to show want of probable cause.

See Opinion Brown, J., Record, pp. 45–47

The order denying the motion directed that "The "matter be sent back to the Commissioner FOR "FURTHER COMPETENT TESTIMONY by either side in "accordance with the opinion rendered herein."

See Order, Record, page 55, folio 101.

Pursuant to this order further testimony was taken before Commissioner Shields, and he reported it back, together with a finding that, in his judgment, probable cause for removal had been shown.

See Record, pages 3 and 4, folios 7 and 8.

Upon this testimony and finding a second application was made to the District Judge for a warrant, and it was granted, but without any finding by him of probable cause.

It was expressly contended by these appellants that the finding of the Commissioner under the order sending the case back simply for further testi-

mony, was without force and effect, and that the District Judge must himself pass upon the question of probable cause.

In refusing to decide the question of probable cause independent of the finding by the Commissioner, Judge Brown said:

> "As respects the finding of probable cause, "I have carefully considered the very ex- "tended briefs and arguments of counsel, "and have examined the voluminous evi- "dence with a view to ascertain whether "there was competent evidence before the "Commissioner sufficient in itself to sustain "his finding of probable cause.
>
> "Under the rule above stated, it is not for "the Judge on an application for removal to "compare different parts of the testimony "in order to determine their relative weight, "or to substitute his own judgment for that "of the Commissioner, even though it "might on the whole evidence be different.
>
> "By this, however, I do not mean to be "understood as expressing any opinion what- "soever on the merits of the case. THE DE- "FENDANTS HAVE GIVEN A GREAT DEAL OF "EVIDENCE TENDING TO SHOW THAT THEIR "CONTRACTS WERE FAIRLY OBTAINED, THEIR "WORK WELL AND HONESTLY DONE, AND "THAT THE GOVERNMENT HAS NOT BEEN DE- "FRAUDED A DOLLAR.
>
> "The Government, on the other hand, has "given evidence tending to a contrary con- "clusion, and it has shown beyond question "that Captain Carter, the employee of the "Government and the engineer in immediate "charge of the work on the Government's "behalf and for several years immediately "preceding the contracts referred to in the

"indictment, had received from the con-
"tractors continuously through his father-
"in-law, in many divisions of profits, one-
"third of the final net proceeds of each
"contract remaining for division among
"the chief contractors; and that this one-
"third amounted in the aggregate to over
"$700,000."

See Opinion Brown, J., Record, page 59, folio 109.

It is thus evident that there has been no finding of probable cause by Judge Brown.

The District Judge, by his own order, and not the Commissioner, became the Committing Magistrate, and it was his duty to pass upon the question of probable cause and to determine for himself whether the appellants should be further held or removed.

Supervisory, and not appellate power was given by the statute to the District Judge over the action of the committing magistrate.

He could refuse to remove on the finding by the Commissioner, or he could order further testimony to be taken so as to satisfy HIMSELF of the existence of probable cause. After the taking of further evidence, it was his judgment and not that of the Commissioner which was to be exercised in weighing the evidence on the question of probable cause. This seems to be the clear meaning of the removal statute as construed by the cases to which we have referred under Point I of this Brief.

Lastly.

The indictment charging the offense for trial upon which it is sought to remove these appellants does not sufficiently charge any offense against the United States.

First.—This Court has expressly held that upon habeas corpus to be discharged from imprisonment under Section 1014, the Court should inquire into the sufficiency of the indictment charging the offense.

Horner *v.* The United States, 143 U. S., 207.

In that case this Court specifically passed upon the question of the sufficiency of the indictment, upon appeal from an order of the Circuit Court, dismissing a writ of habeas corpus and remanding the accused.

In removal proceedings in the State of New York the duty is the more imperative because under the "usual mode of process against offenders" in that State the prisoner is entitled to full opportunity of questioning the indictment and of showing lack of probable cause.

In re Dana, 68 Fed. Rep., 886.

Second.—THE INDICTMENT IN THE CASE AT BAR DOES NOT SUFFICIENTLY CHARGE ANY OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

1st. The indictment consists of ten counts and purports to have been found under Sections 5438 and 5440 of the Revised Statutes of the United States.

Counts one to eight, inclusive, are under Section 5440. Counts nine and ten are under Section 5438.

Section 5440 provides:

> "That if two or more persons conspire "* * * to defraud the United States in any "manner or for any purpose, and one or "more of such parties DOES ANY OVERT ACT "to effect the object of the conspiracy," all the parties shall be liable to a penalty, etc.

Section 5438 provides:

> "That every persons who presents, or "causes to be presented, for payment and "approval to any person in the military "service of the United States any claim "upon the Government, knowing such "claim to be false, fictitious or fraudulent, "or who enters into any agreement, com-"bination or conspiracy to defraud the Gov-"ernment of the United States, by obtain-"ing, or aiding to obtain, the payment or "allowance of ANY FALSE OR FRAUDULENT "CLAIM," shall be punished as therein provided.

2d. The first count, if it charges anything, charges two offences. Its allegations are that the defendants, naming them, did, on the first day of January, 1897, enter into a conspiracy to defraud the United States by means of another conspiracy which the same parties theretofore and about 1891 had entered into, and which last named fraudulent scheme or conspiracy was put into operation in 1891, and continued in operation down to October, 1899. The indictment does not call the second scheme a conspiracy, but a "fraudulent scheme."

It is stated by way of recital that Carter was an officer of the United States Army in the Corps of

Engineers and in charge of River and Harbor improvements in the Savannah District, and was vested with sundry powers, duties and discretion; that he had the power, duty and discretion of proposing projects for improvements; of devising and drafting specifications for contracts; of drafting and suggesting forms for advertisement, of giving notice of bids for work, of fixing the time the advertisement should be published, of suggesting or causing to be fixed the time within which the successful bidder must commence work; of giving out information in regard to contracts to be let; of receiving proposals for, and recommending the awarding of contracts; of approving or rejecting the bonds required in superintending the work and approving or rejecting the work done according as the same was in accordance with the requirements of the contract or not, and of suggesting or approving modifications of the contracts; of approving or rejecting accounts for work done according as said accounts shall be fair and honest or false and fraudulent, and when in funds, of paying or refusing to pay the contractors for work done.

The count then continues that the scheme contemplated that Carter "should so fraudulently exercise" the powers of his office and the discretion vested in him that competition "IN BIDDING FOR SUCH CONTRACTS TO BE LET" should be shut off, and the defendants would be the only real competitors—that all contracts would be obtained by them or some other person or corporation for their benefit; that the work put out on contracts would be let at high and exorbitant cost to the United States; that the specifications for the work should be so devised and drafted as to allow changes of types of material so as to inure to the benefit of the contractors and possible loss to the United States—that the description of material required should be

vague, and of such a character that no one prior to the time of awarding the contract could know what was really required to be done under it; that the quantities of work and character of material could be changed by him under the specifications so drawn so as to insure the contractors the greatest profit and the least cost, and so that others not parties to this scheme who should be the lowest bidders might be oppressed by Carter's construction of the contracts, and that he knowingly should approve of the fraudulent accounts, and should pay such accounts and divide the proceeds, and should do anything else necessary to carry out the scheme.

The indictment then alleges that on the first day of January, 1897, these defendants were proceeding with the construction of the works at Savannah Harbor, under the contract that had been entered into on the 8th of October, 1896, by the Atlantic Contracting Company, which contracts had been fraudulently obtained by means of the scheme set out and that ON THAT DATE the defendants conspired to defraud the United States out of large sums of money, by means of APPLYING that scheme to the execution and completion of the work under the said contracts.

IT WILL BE NOTICED THAT THERE IS NO ALLEGATION THAT THE UNITED STATES WAS DEFRAUDED. Nor is there in this count, or, indeed, in the whole indictment, a single allegation of fact, showing that any act was done, which in this count is charged to have been agreed to be done. It is not alleged that the work was let at high and exorbitant figures. The contracts themselves are not set out so that it could be seen what were the contract prices, and then an allegation as to what was fair and reasonable. There is no allegation that there was, in fact, any change of type of material, by which there was benefit to the contractors, or loss to the United States. No act, or fact, is alleged, showing that

competition was shut off, that bids were unfair; or that any money, the proceeds of the payment of these accounts, was ever divided.

The second to fifth counts contain only charges of acts done to effect the conspiracy set forth in the first count. If the first count is insufficient, then the counts two to five must fall with it, *because they all depend upon and relate to the first count.*

The sixth count alleges that on the first of January, 1897, Carter, with the other defendants, conspired to defraud the United States of large sums of money by means, substantially as follows:

That Carter should fraudulently exercise his powers so that competition provided by law in bidding FOR CONTRACTS TO BE LET should be cut off, and that all contracts let *should be obtained by the conspiritors* at the highest cost to the United States. That Carter would devise and suggest projects for improvements and draft specifications for *contracts to be let*, which contracts *should be obtained* by the conspirators. That large amounts of useless work should be undertaken and done under *such* contracts (that is, contracts to be let), and that in *such* contracts he would exercise his powers in the approval and acceptance of work done under *such* contracts that said contractors would receive large amounts as payment for poor material put in the work under *such* contracts.

This count, like count one, does not allege any act done to effect the object of the conspiracy.

NOW, AS A MATTER OF FACT, NO CONTRACTS WERE LET AFTER THE FIRST OF JANUARY, 1897, IN THE SAVANNAH DISTRICT BY CARTER TO THESE ALLEGED CO-CONSPIRATORS, AND THE ONLY CONTRACT IN FORCE ON THAT DATE WAS THE CONTRACT MADE PRIOR TO THAT DATE, NAMELY, OCTOBER 8TH, 1896, AND NO SUBSEQUENT CONTRACT IS ALLEGED.

The overt acts charged by counts six and seven

both on their face relate to the contract of October 8th, 1896, and not to contracts to be let on January first, 1897, or thereafter, and therefore they cannot be held to charge an act done to effect the conspiracy alleged in the sixth count.

Counts nine and ten allege a conspiracy to defraud the United States by the payment and allowance of a false claim. This claim was for work done in certain specified months under the contract of October 8th, 1896. The time of the conspiracy in these counts is alleged as the first of July, 1897, that being the time when it was claimed these false accounts were presented.

3d. COUNTS TWO TO EIGHT INCLUSIVE WERE HELD BY DISTRICT JUDGE BROWN ON THE FIRST APPLICATION FOR REMOVAL TO BE WHOLLY INSUFFICIENT AND BAD.

He said:

> " The overt act charged in the second count " is irrelevant, since it does not appear to be " in any way connected with the conspiracy al- " leged nor within any one of the means or " devices set forth in the conspiracy count. " The overt acts charged in counts 3, 4 and 5 " are the presentment of alleged ' fraudulent " claims ' to Captain Carter of the Corps of " Engineers, WITHOUT ANY STATEMENT HOW " OR WHEREIN THEY WERE FRAUDULENT. The " items of the claims are given, dated July 1, " 1897, apparently verbatim, for work and " material furnished under the contract of " October 8, 1896. It would be naturally in- " ferred that the charge intended was that " these bills were in some way false and not " according to the contract; that is, that the " work done and the materials supplied were " less than was claimed or that they were of " inferior quality, or in some way different

" from the contract, or that the price was in-
" correct.

" BUT THERE IS NO SUCH AVERMENT AS RE-
" SPECTS ANY OF THE BILLS REFERRED TO IN ANY
" OF THE COUNTS; NOR IS IT STATED THAT ANY
" ONE OF THEM IS FALSE, WHILE FROM OTHER
" PASSAGES IN THE INDICTMENT, AS WELL AS
" FROM THE OBSERVATIONS OF COUNSEL IN THE
" STENOGRAPHER'S REPORT OF THE PROCEED-
" INGS, IT WOULD SEEM THAT THE SUPPOSED
" FRAUDULENT CHARACTER OF THE BILLS WAS
" NOT FOUNDED UPON ANYTHING INCORRECT IN
" THEM OR IN THE WORK, BUT UPON THE AL-
" LEGED FRAUDULENT DEVICES CONTEMPLATED
" IN THE PREPARATION AND LETTING OF THE
" CONTRACTS THEMSELVES, NO SINGLE ONE OF
" WHICH DEVICES IS, HOWEVER, DEFINITELY
" ALLEGED TO HAVE BEEN REALLY EMPLOYED.
" *Such averments not only do not reasonably*
" *apprise the defendants of the nature of the*
" *charges they must meet, but are calculated*
" *to mislead them.* This applies to all the
" counts except the second. The conspiracy
" charged in the sixth count relates wholly
" to future contracts to be let thereafter, *i. e.*,
" after January 1, 1897, while the overt acts
" stated in counts seven and eight relate
" wholly to the prior contracts of October 8,
" 1896. On this additional ground, counts 6, 7
" and 8 would seem to be necessarily bad."

See Opinion Judge Brown, Record, pp. 49–52.

This leaves for consideration the sufficiency of counts 1, 9 and 10.

A. AS TO THE FIRST COUNT:

The first count, if it charges anything, charges

two things: First, a conspiracy in 1891 and another in 1897. This alone would make that count void for duplicity.

Who can tell from the charge in this indictment what means the defendants were charged with using or intending to use in their conspiracy to defraud the United States? It charges that the said "fraudulent scheme" contemplated that these appellants and the other persons named as defendants in the indictment "WOULD USE SOME ONE OR MORE "OR ALL SAID MEANS AND DEVICES AND SUCH OTHER "AND ADDITIONAL DEVICES AS MIGHT BECOME NECES-"SARY FOR THE ACCOMPLISHMENT OF THE GENERLL "FRAUDULENT DESIGN OF THE SCHEME HEREINBE "FORE SET FORTH."

See Record, p. 18, fol. 35.

How was it possible to have made an agreement on the first of January, 1897, that Carter should "so fraudulently exercise the said powers of his "office and the said discretion so invested in him "that competition in the bidding for said contracts "to be let for the United States through him "should be cut off," with reference to the contracts of October 8th, 1896? On the 1st of January, 1897, all bids for the contracts of October 8th, 1896, had been offered. There was no more bidding on those contracts to be done. Hence it was impossible to apply this fraudulent scheme, on January 1st, 1897, to the contract of Octobder 8, 1896, so that these appellants, or some one for their benefit, "would be the "only real bidders for said contract in said district, "and that all contracts which were from time to "time let for the improvement of rivers and har-"bors in the Savannah district would be obtained "by one or the other of said bidders." Nor was it possible that, on January 1st, 1897, the fraudulent

scheme that " the said works in said district, to " be done by the United States on contracts, would " be let at high and exorbitant cost to the United " States of America," could be applied to the contracts of 1896.

The specifications for the contracts of that date had already been drawn, adopted and acted upon, and yet, under this indictment, it is charged that these defendants, on the 1st of January, 1897, agreed that Carter, as engineer officer, SHOULD " so devise and draft the specifications " as to permit the United States to be defrauded. It is unnecessary to further analyze the averments. Clearly every act that was required to be done prior to the 1st of January, 1897, could not form part of the scheme or conspiracy, on that date, to apply those acts to the contract of 1896.

To quote Judge Brown:

> " But of the fifteen or twenty devices, " which it is alleged that scheme 'contem- " templated,' three-fourths relate to the " terms, specifications and letting out of the " contracts themselves, so that most of the " scheme could not possibly be 'applied' to a " conspiracy formed on January 1st, 1897, " several months after the contracts were let " out. Of the remaining means or devices, " what ones are meant to be charged is left " wholly undefined.
>
> " This is all the more vague and uncertain, " since even the original fraudulent scheme " itself only alleged to have contemplated " that the conspirators would use some one or " more or all of said means and devices, and " such additional devices as might become " necessary."
>
> Opinion Brown, J., Record, p. 51, fol. 92.

What information is contained in the statement that the defendants intended or contemplated applying to the conspiracy "SUCH OTHER "AND ADDITIONAL DEVICES AS MIGHT BECOME "NECESSARY FOR THE ACCOMPLISHMENT OF THE "GENERAL FRAUDULENT DESIGN?" Can such an averment be held sufficiently to describe the act so as to apprise the defendant of the act intended to be given in evidence as tending to show that the unlawful scheme was put into operation? What words could the pleader have used more indefinite, uncertain and hidden? Who is to determine what "OTHER AND ADDITIONAL DEVICES" might be used, and who is to say which of those "MIGHT BECOME NECESSARY?"

We respectfully insist that this count of the indictment is wholly uncertain and indefinite as well as void for duplicity. In fact, it violates every principle of good pleading.

Blitz *v.* U. S., 153 U. S., 315.
Evans *v.* U. S., 153 U. S., 584.
Pettibone *v.* U. S., 148 U. S., 197.
U. S. *v.* Hess, 124 U. S., 483.
U. S. *v.* Britton, 108 U. S., 189.
U. S. *v.* Cruikshanks, 92 U. S., 558.
Lambert *v.* People, 9 Cowan, 578.
Commonwealth *v.* Hunt, 4 Metcalf, 111.
People *v.* Brady, 56 N. Y., 182.

It would seem that the objections urged to the sufficiency of this count must prevail.

B. AS TO COUNTS NINE AND TEN.

These counts allege that the defendants conspired TO DEFRAUD the United States by obtaining the allowances and payment of fraudulent claims. The alleged fraudulent claim is described as a claim for

labor and material "furnished by the Atlantic "Contracting Company * * * under a contract "theretofore entered into on the 8th of October, "1896, for improving Cumberland Sound, within "the State of Georgia, and which contract had "been entered into between the Atlantic Contract- "ing Company and the said Oberlin M. Carter," and "was for the sum of $345,000 for work, labor "and supplies claimed to have been furnished to "the United States by the said Atlantic Contract- "ing Company, for said work, at Cumberland "Sound," during seven months.

As the overt act done pursuant to the conspiracy alleged, a copy of the account for the month of December, 1896, is set out.

Neither in the part of the count that charges the conspiracy nor in the part charging the overt act is there one solitary fact averred showing that the account presented was false or fraudulent in any particular.

It is not stated that the contract referred to was a fraudulent one, or that the work, labor and supplies had not been furnished. Nor is it alleged that the prices in the bill set out are not the prices agreed upon and contracted for, nor that the material is not the material agreed upon, nor that the quantities therein stated are not the actual quanti ties put in.

For aught that appears, the contract was a valid one, the materials were actually furnished, and the prices were correct.

The gist of the offense, under Section 5438, is conspiring TO DEFRAUD the United States.

YET THERE IS NO AVERMENT THAT THE UNITED STATES HAS BEEN DEFRAUDED OF A SINGLE DOLLAR.

The argument made as to the ninth count applies equally to the tenth. The only difference between the two is that the ninth relates to the contract for

work at Cumberland Sound, while the claim alleged in the tenth count relates to work at Savannah. Referring to the averments of the indictment Judge Brown says:

> "The mere statement of the presentment
> "of 'fraudulent claims' without any indica-
> "tion how or wherein they were fraudulent,
> "which is the basis of all the counts, except
> "the second, is not a proper or sufficient
> "statement of any facts or circumstances
> "on which a judicial judgment of probable
> "cause can be based; it would not be suf-
> "ficient for an arrest, even in a petty civil
> "case. There is no allegation anywhere in
> "the indictment that the work and materials
> "supplied and the bills presented were not
> "strictly according to contract, that the
> "prices claimed or allowed were exorbitant,
> "that improper work was passed or improper
> "substitutions made, nor are any facts stated
> "showing actual fraud or that the Govern-
> "ment has been defrauded of a dollar."

Opinion Brown, J., Record, p. 53, fols. 96–97.

We, therefore, respectfully submit that as this Court has authority to pass upon the sufficiency of the indictment, and as it clearly appears that the indictment, as drawn, does not sufficiently charge any offense against the United States, on that ground, as well as the others, which we have already urged, these appellants should be discharged from further imprisonment.

In Conclusion.

The order denying the application for a writ of habeas corpus should be reversed, and the appellants should be discharged from imprisonment.

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